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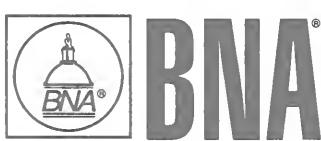
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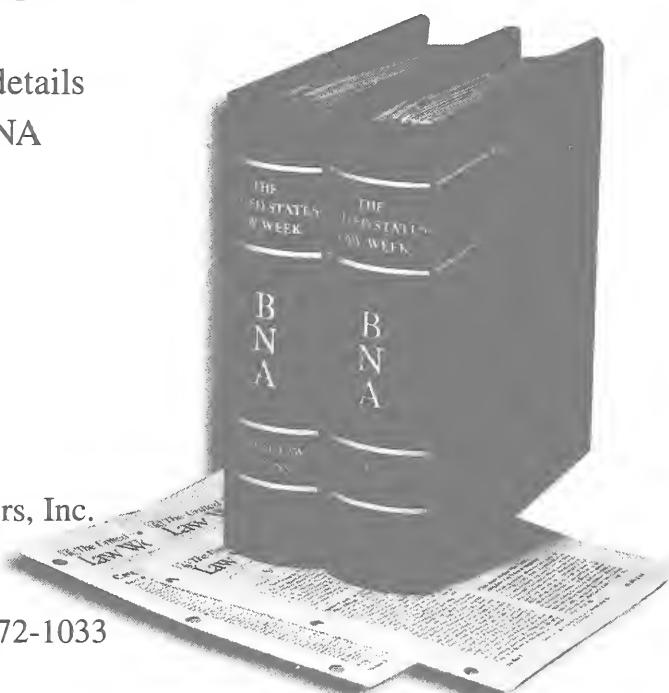
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**WILLIAM A. KERR**

## TRIBUTE TO ANDY KERR

SUSANAH MEAD\*  
JOAN RUHTENBERG\*\*

Professor William A. Kerr retired from Indiana University School of Law—Indianapolis at the end of the 1997-98 academic year after thirty years of teaching. We are honored to have the opportunity to write this tribute, and we consider ourselves well suited to the task. Both of us had the privilege, shared now with hundreds of Indiana lawyers, of having been taught by Andy Kerr. In addition, we have known him as a friend and colleague for twenty years. Thus, we have a unique perspective on Andy and his remarkable contributions to this institution.

Andy demonstrated his academic bent early. He received his Bachelor of Arts degree in 1955 and his Juris Doctor degree in 1957 from West Virginia University, where he was named to Phi Beta Kappa and the Order of the Coif. In 1957 he received a Ford Foundation Fellowship to attend the Harvard Law School, which awarded him the Master of Laws degree in 1958. His legal career began in 1958 when he was assigned to serve as a trial attorney in the Judge Advocate General Department of the United States Air Force. During his three years of military service, Andy served as prosecutor or defense attorney in numerous court-martial proceedings involving charges ranging from AWOL to murder, with everything from larceny to bigamy in between.

After completing active duty with the Air Force, Andy joined the litigation department of a Philadelphia law firm, Schnader, Harrison, Segal & Lewis, where he practiced for three years before deciding to pursue an academic career. As an additional preparation for that career and because of his abiding interest in religion and law, he entered the Duke University Divinity School and in 1968 earned a Master of Divinity degree with summa cum laude honors. That year, he joined the faculty at Indiana University School of Law—Indianapolis and has been a member of the faculty ever since. His teaching interests have been many and varied. During his career, he has taught Criminal Law, Criminal Procedure, Evidence, Domestic Relations, Church and State, Torts, Jurisprudence, Appellate Advocacy, and Trial Advocacy. It is fair to say, however, that his great love, and the focus of his considerable energy, both scholarly and practical, has been criminal law and procedure in general and the Indiana criminal justice system in particular.

Throughout his teaching career, Andy was deeply interested in the relationship between practice and theory. Shortly after joining the faculty, he took advantage of an opportunity to serve as Assistant United States Attorney, while continuing to teach part-time. When he returned to full-time teaching in 1972, he was asked to assist the Indiana Prosecuting Attorneys Association in establishing a staff agency at the law school. He served as Director of Research

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for this agency, which became the Indiana Prosecuting Attorneys Council. The success of this venture prompted the Indiana judiciary to enlist his aid in creating a similar state agency for the judiciary, which became the Indiana Judicial Center. Andy served as its Executive Director for twelve years, although he remained a member of the law school faculty.

Andy's many efforts to improve the criminal justice system in Indiana and the accolades awarded to him for those efforts are too numerous to recount here. Notable among them, however, was his work with the Indiana Criminal Law Study Commission from 1973 until 1989. During that time, with Andy often serving as secretary, the commission completely revised the state's antiquated criminal code and criminal procedure code. His tireless crusade to improve the juvenile justice system earned him a distinguished service award from the Indiana Council of Juvenile Court judges in 1979 and an award for an outstanding judicial education program from the National Council of Juvenile and Family Court Judges in 1985. It is no exaggeration to say that Andy Kerr has been one of the most influential forces in shaping the Indiana criminal justice system in the last quarter century.

In addition to these impressive accomplishments, Andy Kerr was a superb teacher. He taught hundreds of law students and inspired many of them to pursue careers in criminal justice. He also taught practicing lawyers, judges, and on at least one occasion, the public. During professional boxer Mike Tyson's trial, Andy was the legal analyst for the local NBC affiliate. Always the teacher first and foremost, Andy took this experience into the classroom. Struck by how closely the various motions made before and during the trial coincided with the material that he intended to cover in his Criminal Procedure class, Andy decided to use the trial proceedings as a teaching tool. For three weeks, his students had the rare experience of learning principles of criminal procedure as the principles were being applied in an ongoing and much publicized criminal proceeding. This novel approach to teaching a law school subject caught the attention of the media. A television crew visited Andy's class to document Andy's use of the Tyson proceedings as teaching material.

When we were law students, we each had the good fortune to take a class from Andy, one of us in Criminal Law and the other in Evidence. Our recollections of Andy as a teacher are vivid and remarkably similar. We recall, for example, the awe that he inspired in us and our classmates. When Andy walked into the classroom, a hush fell, books opened, and students prepared to engage in a dialogue that required precision, logic, and clarity, as well as a thorough understanding of the procedural and substantive issues in each assigned case. We were impressed by his ability to reduce legal issues into simple logical steps while still considering the complexities of the issues—the essence of thinking like a lawyer—and to teach us to do the same. He was adroit at drawing from students far more than they thought they knew. To us, he was the consummate law professor. We also recall as if it were yesterday the Andy Kerr exam experience—the dread before, the writer's cramp during and the elation afterwards when we learned we had received an A from Andy Kerr!

More recently, we have had the good fortune to be Andy's colleagues. We know that we speak for the entire faculty when we say he has earned our deep

respect for his service to our law school. He brought a principled approach and tireless dedication, as well as good humor, to all of his law school responsibilities, from the preparation of teaching materials to the seemingly endless task of reading admissions files. When his experience was needed, he willingly and unselfishly took on extraordinary faculty responsibilities, even in the face of publishing deadlines and other commitments. For this we will always be grateful.

As is to be expected from someone with Andy's energy and enduring interest in the law, he has not ended his legal career, though he has retired from teaching. At a time in his life when most people would be seeking a quiet retirement, Andy is hanging out his shingle. His return to the practice of law is the law school's loss, but we have confidence that if we are ever in need of his wise counsel, Andy will not let us down.



# THE MYTHOLOGY OF WAIVERS OF BANKRUPTCY PRIVILEGES

THOMAS G. KELCH\*  
MICHAEL K. SLATTERY\*\*

## INTRODUCTION

Contractual waiver of privileges<sup>1</sup> granted by the Bankruptcy Code is surrounded by a mythology. The mythology is expressed in an assumption that bankruptcy privileges are essentially non-waivable. This assumption is then cloaked in the armor of the Constitution, statutory language and public policy.

Several recent court decisions that have enforced contractual waivers of bankruptcy privileges in certain narrow contexts have challenged this mythology. That the mythology still exists, however, is evident from cases continuing to deny the validity of such waivers and practitioners who whisper in the dark that waivers must be limited to narrow circumstances lest the whole house of cards fall to the reality that bankruptcy privileges really are not waivable.<sup>2</sup>

Much more important rights and privileges may be waived at a whim. We can waive the privilege against self-incrimination, the right to a jury trial, and innumerable other constitutional, statutory and common law rights without hesitation or fanfare. Thus, we may flippantly sacrifice our freedom or, perhaps, our life in a capital offense. However, we may rarely, if ever, waive the privileges provided by the Bankruptcy Code due to this bankruptcy waiver mythology.

Why do we have this mythology? How did we come to have it? Is there some historical explanation? How should attempts to waive the privileges of bankruptcy be treated in a world where this mythology is unmasked? All of these issues will be explored.

Given the law of waiver as it exists elsewhere in the law, it is maintained in this Article that the present view of contractual waiver of privileges in bankruptcy is enshrouded in falsities and half-truths that can be remedied by looking at the issue not as a sort of exalted class of bankruptcy issue but as waiver is viewed in other contexts—as a purely contractual issue. This Article will first analyze the present state of the law relating to waiver of bankruptcy privileges. Second, it will search for the sources of the idea that privileges in

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1. The phrase, “bankruptcy privileges” is used purposefully to emphasize, as will be shown, that there are no “bankruptcy rights.”

2. In regard to caution concerning practitioner overuse of waivers, see Michael St. Patrick Baxter, *Prepetition Waivers of the Automatic stay: A Secured Lender's Guide*, 52 BUS. LAW. 577 (1997).

bankruptcy generally may not be waived. Third, we will analyze the concept of contractual waiver generally and determine the appropriate circumstances for enforcement of contractual waivers of statutory privileges. Fourth, this latter analysis will be applied to statutory bankruptcy privileges to ascertain when such privileges may appropriately be waived.

The thesis that will emerge is that accepted views of waivers of bankruptcy privileges are gripped by a mythology and that, properly analyzed under the law of contractual waiver, bankruptcy privileges should be freely waivable given satisfaction of certain requisites of the law of contract.

## I. PRESENT LAW

### *A. The Present Case Law*

Over the past ten years, creditors have experimented with pre-bankruptcy "workout" agreements that allow uncontested relief from stay if the borrower petitions for bankruptcy relief. It is primarily in this area that the battle over waiver of bankruptcy privileges has been fought, and it is these cases on which we will focus. Based largely on loosely articulated perceptions of public policy, the courts have been very reluctant to enforce agreements containing stay waivers. The judicial opinions in this area offer no real analysis of the issue as one of contractual waiver of a statutory right which is, as will be shown, the true issue here. The authors think this case law is the product of vestigial depression-era sympathy for borrowers that places bankruptcy and debtor-creditor law on a different plane from other law with respect to waiver.

The cases fall into three basic groups.<sup>3</sup> A few courts enforce waivers, most treat waivers as a factor to be considered in relief from stay litigation, and a small number flatly prohibit waivers for reasons of policy.<sup>4</sup>

Two cases from the late 1980s do seem to enforce relief from stay agreements.<sup>5</sup> These cases, *In re Club Tower* and *In re Citadel Properties*, carefully distinguish such agreements from outright waivers of the privilege of filing bankruptcy, which nearly everyone believes run counter to public policy.<sup>6</sup> On a close reading, it seems that the courts in both cases had more than waiver provisions on which to rely. The courts also relied on the finding that the cases

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3. *Id.* at 579-87.

4. *Id.*

5. *In re Club Tower*, L.P., 138 B.R. 307, 311 (Bankr. W.D. Ga. 1991) ("Pre-petition agreements regarding relief from stay are enforceable in bankruptcy."); *In re Citadel Properties, Inc.*, 86 B.R. 275, 276 (Bankr. M.D. Fla. 1988) (holding that "the terms of the prepetition stipulation are binding upon the parties and that sufficient cause exists to lift the stay pursuant to section 362(d)(1)").

6. The *Club Tower* court thought that an agreement for relief from stay was merely the waiver of a "single benefit" of the bankruptcy process and allowed the debtor to retain "core rights" like the entitlement to a discharge, to assume or reject executory contracts, and to pursue preferences and fraudulent conveyances. 138 B.R. at 311.

were filed in “bad faith” and should be dismissed regardless of any waiver.<sup>7</sup>

The majority of recent cases take a middle ground. These cases hold that the waiver is neither enforceable *per se* nor unenforceable. The courts start from the premise that a contractual waiver is a primary factor in determining whether relief from stay may be granted but go on to determine whether other grounds, such as bad faith or lack of possibility of reorganization, justify relief:

[T]he waiver is a primary element to be considered in determining if cause exists for relief from the automatic stay under §362(d)(1) . . . . The burden is on the opposing parties to demonstrate that it should not be enforced . . . . The court will consider other factors, such as the benefit which the debtor received for the workout agreement as a whole; the extent to which the creditor waived rights or would be otherwise prejudiced if the waiver is not enforced; the effect of the enforcement on other creditors; and, of course, whether there appears to be a likelihood of a successful reorganization.<sup>8</sup>

In *In re Pease*,<sup>9</sup> an example of the third group of cases, it was determined that a pre-petition waiver of the benefits of the stay is unenforceable *per se* for several reasons. First, the pre-petition debtor is an entity separate and distinct from the debtor in possession without fiduciary duties to creditors and therefore lacks the capacity to act on behalf of the debtor in possession.<sup>10</sup> As a result, the debtor cannot bind the estate. Second, enforcement of the waiver would run afoul of section 363(l) of the Bankruptcy Code, which allows the debtor to use property of the estate despite a contractual provision that terminates or limits the debtor’s rights if the debtor is insolvent or petitions for bankruptcy relief.<sup>11</sup> Third, enforcement of the waiver would allow the single creditor and the debtor to opt out of the “collective” remedy of bankruptcy to the detriment of the debtor’s other creditors.<sup>12</sup>

Thus, while there has been some movement toward allowing waivers of bankruptcy privileges, considerable opposition to enforcing such waivers still remains.

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7. For example, in *In re Club Tower*, the court made an alternative finding that, since the debtor had only a single asset, no employees, and only a few “de minimis” unsecured claims and had enjoyed the benefits of a pre-petition forbearance agreement, the movant was also entitled to relief because the debtor’s case was filed in bad faith. *Id.* In *In re Citadel Properties*, the debtor had unsuccessfully sought pre-petition refinancing, had only one asset, had no employees, and sought bankruptcy relief one hour before a scheduled foreclosure sale. 86 B.R. at 276.

8. *In re Powers*, 170 B.R. 480, 484 (Bankr. D. Mass. 1994); *see also In re Jenkins Court Assocs.*, L.P., 181 B.R. 33 (Bankr. E.D. Pa. 1995); *In re Darrell Creek Assocs.*, L.P., 187 B.R. 998 (Bankr. D.S.C. 1995) (citing *Powers* with approval).

9. 195 B.R. 431 (Bankr. D. Neb. 1996); *see also In re Sky Group Int’l, Inc.*, 108 B.R. 86 (Bankr. W.D. Pa. 1989).

10. *In re Pease*, 195 B.R. at 433.

11. *Id.* at 434.

12. *Id.*

### *B. The Mythology of the Present Case Law*

The present law holding that waivers of bankruptcy privileges are not enforceable or are only "factors" to consider use various supporting arguments. Upon careful analysis, each of these arguments is myth.

1. *Myth No. 1: Waivers of Bankruptcy Privileges Violate the Constitution.*—A number of courts have held that waivers of bankruptcy privileges, usually the privilege of filing bankruptcy but sometimes other bankruptcy privileges, violate a constitutional right to file bankruptcy.<sup>13</sup>

This is the most flagrantly false of the myths. The Constitution states that "Congress shall have the Power to . . . establish . . . uniform Laws on the subject of Bankruptcies throughout the United States."<sup>14</sup> Not only is there no constitutional right to file bankruptcy, but Congress need not even create a bankruptcy law. In fact, there was (with three short unsuccessful exceptions) no bankruptcy law for more than the first 100 years of our history.<sup>15</sup> Thus, any "right" to file bankruptcy is statutory, not constitutional.

At least one case related to this issue leaned in a more sensible direction than those cases espousing the existence of a constitutional right to file bankruptcy. *United States v. Royal Business Funds Corp.*<sup>16</sup> recognized that the privilege of filing bankruptcy has limits. While the case stated that it did not intend to change the rule that a person may not waive the ability to file a bankruptcy case, it held that a debtor may, in connection with a federal receivership, enter into a stipulation that effectively limits the debtor's ability to file a bankruptcy case.<sup>17</sup> The case provided apparent recognition that filing bankruptcy is not a constitutional right. Perhaps this suggests movement in a direction more in keeping with the legal realities.

2. *Myth No. 2: Waivers of Bankruptcy Privileges Violate Provisions of the Bankruptcy Code.*—

a. *Ipso facto clauses and the like.*—The courts also wrestle with specific provisions of the Bankruptcy Code in analyzing bankruptcy privilege waivers. For instance, sections 541(c), 363(l), and 365(e) essentially say that a property interest becomes part of the debtor's estate which the debtor may use (or, if the property interest is an executory contract or lease, may assume) notwithstanding a contractual provision that purports to impair the debtor's rights in such property

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13. *Merritt v. Mt. Forest Fur Farms*, 103 F.2d 69 (6th Cir. 1939); *In re Pine Tree Feed Co.*, 112 F. Supp. 124 (D. Me. 1953); *In re Citadel Properties, Inc.*, 86 B.R. at 276 (waiver of the ability to file bankruptcy violates the Constitution but not waiver of the automatic stay); *In re Adana Mortgage Bankers, Inc.*, 12 B.R. 989 (Bankr. N.D. Ga. 1980).

14. U.S. CONST. art. I, § 8.

15. See generally CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY 60-85 (1935); 1 JAMES WM. MOORE ET AL., COLLIER ON BANKRUPTCY ¶ 0.04 (14th ed. 1974).

16. 724 F.2d 12 (2d Cir. 1983).

17. *Id.* at 15-16.

if it files bankruptcy or becomes insolvent.<sup>18</sup> Some courts, like the court in *Pease*, have expressed concern that the enforcement of waivers of bankruptcy privileges may run afoul of these statutory provisions.<sup>19</sup>

While these provisions are of some relevance to the waiver issue, none of them can reasonably be interpreted to prohibit waivers of bankruptcy privileges in any significant number of circumstances. One clear fact is that no statutory provision exists that gives anyone a "right" to file bankruptcy.<sup>20</sup> Certain sorts of entities, like estates and trusts, cannot file at all.<sup>21</sup> Moreover, the courts have the ability to abstain from hearing any case.<sup>22</sup> Therefore, there is no statutory basis for claiming an absolute right to file bankruptcy.

It is also important not to get swept away with the provisions briefly described above that restrict the enforceability of ipso facto clauses, since these provisions are narrow in scope. Section 541(c) states that a property interest becomes part of the debtor's estate notwithstanding a contractual provision that purports to impair the debtor's property rights if it files bankruptcy or becomes insolvent.<sup>23</sup> All this does is cause property to become property of the estate notwithstanding a clause purporting to state otherwise. Section 541(c) does not affect waivers of bankruptcy privileges, since these waivers do not terminate or change the debtor's state law property rights upon filing. It does not prevent waiver of the privilege of a discharge or the automatic stay or the like. Property of the debtor is property of the estate whether or not the stay applies to it. Of course, it may not be property of the estate for long, but property may quickly cease to be property of the estate for many reasons, not just because of a waiver of the stay. If a stay waiver is given effect, the property remains property of the estate until it is transferred, and the debtor will still have all rights afforded under state law to reinstate its defaulted obligation, to contest the creditor's right to foreclose, and to limit the estate's monetary obligation following foreclosure.

Section 363(l), which provides that the debtor may use, sell, or lease property of the estate notwithstanding an ipso facto clause,<sup>24</sup> also does not affect waivers of bankruptcy privileges, because such waivers do not limit the estate's right to use, sell or lease property. So long as the property in question remains property of the estate, the estate is free to use, sell or lease it.

One could argue that the ability to use property is ephemeral if stay waivers are enforced. If such waivers are enforced, the ability to use property is a fleeting privilege that quickly vanishes upon foreclosure and sale. There are several responses to this argument. It is neither required nor intended that a debtor have a right to use property under section 363 for some specified period

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18. 11 U.S.C. §§ 541(c), 363(l) & 365(e) (1994).

19. *In re Pease*, 195 B.R. at 434.

20. See Edward S. Adams & James L. Baillie, *A Privatization Solution to the Legitimacy of Prepetition Waivers of the Automatic Stay*, 38 ARIZ. L. REV. 1, 26-27 (1996).

21. See 11 U.S.C. §§ 101(9) & (41), 109(a) (1994).

22. *Id.* § 305.

23. *Id.* § 541(c).

24. *Id.* § 363(1).

of time. The estate's ability to use property may be terminated due to failure to comply with government regulations, or failure to maintain insurance or because a right to relief from stay otherwise exists, as in a case where the debtor voluntarily agreed to borrow more than the collateral for the debt is worth. If a debtor does any of these things, the result is effectively the same as a stay waiver. No one suggests that these events violate section 363. Note as well that even if one accepts the argument that stay waivers violate section 363(l), this does not impact other bankruptcy privilege waivers, like waiver of the discharge or of the ability to file bankruptcy itself.

Section 365(e) provides that an executory contract or lease may not be terminated or have any of its provisions terminated or modified as a result of a clause triggered on the filing of bankruptcy.<sup>25</sup> This provision applies only to executory contracts and leases.<sup>26</sup> Most of the contracts in which one finds waivers of privileges in bankruptcy are loan agreements that are neither executory contracts nor leases. Thus, to the extent that this provision does have an impact on waivers of bankruptcy privileges, it is pertinent to only a very small number of such cases. Waiver of a bankruptcy privilege, like the stay or discharge or, for that matter, the ability to file, does not terminate an executory contract or lease and does not terminate or modify any provision of such a contract or lease. Even in the case of a stay waiver, such a waiver does not terminate the contract or modify its provisions. A stay waiver simply allows the nondebtor party to proceed to terminate the contract under otherwise applicable law, if there are grounds for termination. As a result, even if such a clause were found in an executory contract or lease, the clause would not violate section 365(e) since it would not itself terminate or modify the contract or lease or any provision of the contract or lease.

We think that some arguments can be drawn from the statute to support enforcement of bankruptcy privilege waivers. Congress has said that certain contract provisions—such as those that might reduce a debtor's state law property rights upon filing—are not enforceable in a bankruptcy.<sup>27</sup> Congress has *not* said that stay or other waivers are unenforceable. That Congress has regulated certain types of contractual provisions and has ignored waivers of bankruptcy privileges weighs against a rule prohibiting enforcement of waivers.

Congress has also shown that it does not regard the stay as inviolate. Section 362(c)(8) expressly says that the stay will *not* prevent the Secretary of Housing and Urban Development from enforcing an insured mortgage against 5 or more dwelling units.<sup>28</sup> Sections 365(c)(12) & (13) state that, ninety days after the case is filed, the stay will no longer prevent the Secretary of Commerce or Transportation from enforcing a ship mortgage under the Merchant Marine Act.<sup>29</sup>

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25. *Id.* § 365(e). Note that there is a similar provision in § 365(f) that allows assignment of an executory contract notwithstanding an *ipso facto* clause. *Id.* § 365(f).

26. *Id.* § 365(e).

27. See, e.g., *id.* §§ 541(c), 363(l) & 365(e) (previously discussed).

28. *Id.* § 362(c)(8).

29. *Id.* § 365(c)(12) & (13).

Further, recently enacted section 362(d)(3) says that the stay against “single asset real estate” terminates ninety days after the case is filed, unless the debtor has filed a plan with a reasonable possibility of confirmation or has begun payments to assure its lender a fair return on the value of its collateral.<sup>30</sup> These exceptions, among others, show that Congress has recognized that the stay may terminate in numerous circumstances without the need for any showing of cause. Thus, Congress has recognized that the privileges of bankruptcy are not inviolate and are subject to various limitations. One can argue that freely negotiated waivers of bankruptcy privileges should be one of these limitations.

Thus, the relevant statutory provisions do not typically apply to the sorts of situations in which one finds waivers of privileges in bankruptcy cases and are generally not an impediment to waiver of bankruptcy privileges. In addition, the actions of Congress in certain areas can be interpreted as weighing against prohibitions on waivers of bankruptcy privileges.

b. *The automatic stay provisions.*—It has been argued, at least in the context of the automatic stay, that the plain language of the Bankruptcy Code prohibits waivers of bankruptcy privileges. Professor Daniel Bogart has urged, based in part on the kind of “plain meaning” statutory analysis proposed by one of the present authors,<sup>31</sup> that the plain meaning of section 362 prohibits contractual stay waivers.<sup>32</sup>

Bogart first notes that section 362(a) makes the stay applicable to all entities.<sup>33</sup> There are no exceptions of significance to waivers of the stay.<sup>34</sup> Next, Bogart shows that the only relief from a stay provision that might be a basis for enforcement of waivers of the stay is section 362(d)(1).<sup>35</sup> This subsection states that relief from the stay may be granted for “cause.”<sup>36</sup> The issue then becomes, according to Bogart, whether a waiver of the stay can constitute “cause” under section 362(d)(1).<sup>37</sup>

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30. *Id.* § 362(d)(3).

31. See Thomas G. Kelch, *An Apology for Plain Meaning Interpretation of the Bankruptcy Code*, 10 BANKR. DEV. J. 289 (1994).

32. Daniel B. Bogart, *Games Lawyers Play: Waivers of the Automatic Stay in Bankruptcy and the Single Asset Loan Workout*, 43 UCLA L. REV. 1117 (1996).

33. *Id.* at 1150.

34. *Id.*

35. *Id.* at 1150-53.

36. 11 U.S.C. § 362(d)(1) (1994). The entire argument here is based on the idea that enforcement of any contractual waiver of the stay must be analyzed simply as a ground for relief from stay; that is, stay waivers cannot be self executing. This is supported by the case law. See Baxter, *supra* note 2, at 591; Adams & Baillie, *supra* note 20, at 10; *In re Psychotherapy & Counseling Ctr., Inc.*, 195 B.R. 522, 534 (Bankr. D.C. 1996); *In re Powers*, 170 B.R. at 483; *Farm Credit of Central Florida, ACA v. Polk*, 160 B.R. 870, 873-74 (M.D. Fla. 1993); *In re Sky Group Int'l, Inc.*, 108 B.R. at 88. However, the thesis of this Article is to the contrary. It is our view that such waivers should be enforceable apart from the provisions of section 362(d). In any event, for the purpose of this discussion, we will assume the non-self executing nature of stay waivers.

37. Bogart, *supra* note 32, at 1150-53.

In plain meaning analysis, the issues are what are the meanings of "waiver" and "cause," and can "waiver" be something that falls within the meaning of "cause." In answering these questions, Bogart finds that the common legal meaning of "waiver" requires a consensual act.<sup>38</sup> Bogart then argues that "cause" does not include consensual or voluntary acts. One foundation for this argument is that the only type of "cause" actually described in the Bankruptcy Code, the lack of adequate protection, is not characterized by voluntary acts.<sup>39</sup> Moreover, Bogart contends that under section 1104 of the Bankruptcy Code, another provision that uses the term "cause," the term is not intended to apply to consensual pre-petition actions.<sup>40</sup> Further, the term "cause" and the way it has been interpreted imply that an independent "inquiry" into cause is required by the Bankruptcy Code.<sup>41</sup> This too suggests that cause does not include consensual arrangements. Based on these premises, along with reference to the legal and common definitions of cause, Bogart concludes that "cause" as used in section 362(d)(1) is meant to refer to nonconsensual circumstances, not to agreements. Waiver is consensual; cause requires something nonconsensual. Therefore, "waiver" cannot be "cause."<sup>42</sup>

While Bogart has done an excellent analysis of the language of section 362, we disagree in part with this analysis. While it is true that "waiver" is a consensual act, there is nothing in the Bankruptcy Code or, for that matter, in accepted legal or lay use of the term "cause" that suggests that cause cannot be consensual. In fact, the legal definition of cause quoted in a footnote by Bogart makes clear that the voluntary or consensual nature of a circumstance has nothing to do with whether this circumstance constitutes "cause." "Cause" is defined as:

Each separate antecedent of an event. Something that precedes and brings about an effect or result. A reason for an action or condition. A ground for a legal action. An agent that brings something about. That which in some manner is accountable for a condition that brings about an event or that produces a cause for the resultant action or state.<sup>43</sup>

Nothing in this definition suggests that a consensual act cannot be a "cause." All that is necessary to be a cause is to be an effective antecedent to an event; a voluntary action can be an effective antecedent to an event. Further, the legal and lay dictionary definitions of cause make clear that voluntary acts can be causes when they state that a cause can be "an agent that brings something about."<sup>44</sup> An agent bringing something about requires a volitional action.

It is also not so clear as Bogart contends that a lack of adequate protection cannot be a voluntary act. If a debtor fails to insure and properly care for

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38. *Id.* at 1151-52.

39. *Id.* at 1152-54.

40. *Id.* at 1153-54.

41. *Id.*

42. *Id.* at 1152-53.

43. BLACK'S LAW DICTIONARY 221 (6th ed. 1990).

44. WEBSTER'S NINTH COLLEGIATE DICTIONARY 217 (1989).

property either pre- or post-petition, this failure may constitute a lack of adequate protection. In what sense is this not consensual or voluntary? Further, agreements for relief from stay are frequently made post petition. Often, the court makes no "independent inquiry" into the propriety of such agreements. The fact is that absent objection, the agreement itself is considered cause for relief from stay. Note also that the Bankruptcy Code provides no basis for distinguishing pre-petition from post-petition agreements relating to the stay. "Cause" is not bifurcated into pre- and post-filing concepts. Since it is commonly accepted that voluntary post-petition agreements can constitute grounds for relief from stay and that there is no statutory basis for distinguishing pre- and post-petition agreements of this kind, pre-petition waiver agreements should, it seems, be given at least the same effect as post-petition agreements.

Nothing about the term cause, either as used in the Bankruptcy Code, in the law generally or in common usage, suggests that a cause may not be a voluntary waiver of a privilege.<sup>45</sup> Thus, nothing in the Bankruptcy Code precludes grounding relief from stay on a pre-petition agreement to waive the privilege of the stay.

3. *Myth No. 3: There Are Strong Public Policy Reasons Against Enforcement of Waivers of Bankruptcy Privileges.*—The case law asserting that bankruptcy privileges may not be waived or may be waived only in extraordinary circumstances tends to rely on the idea that such clauses violate "public policy." Many things have been identified as public policies relevant to this issue, but we will concentrate only on what are the most prevalent and most plausible.

It is sometimes stated that the policy of promoting a "fresh start" causes waivers of bankruptcy privileges to be unenforceable.<sup>46</sup> The policy of a "fresh start" is, however, meant to apply only to individuals, not juridical entities. The force of this policy is nonexistent in the corporate and partnership worlds.<sup>47</sup> Therefore, this policy is of limited application and is not of consequence in most cases where one sees waivers of bankruptcy privileges.

Also a policy favoring reorganizations exists that militates against waivers.<sup>48</sup> This policy would apply to juridical entities. It would not apply when an entity files a liquidation case. Note that one can see this policy as cutting in more than

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45. Note that probably the most common criticism of plain meaning analysis is that there is no such thing as "plain meaning" and reasonable people can always disagree about the meaning of words. It will now be argued that, by criticizing Bogart's position, we have proved this point, contrary to Kelch's "Plain Meaning" article. Kelch, *supra* note 31. While the sting of this criticism is felt, we believe that there is clear plain meaning in the terms involved in this argument. We believe that Bogart's analysis reads too much into the Bankruptcy Code provisions and the definitions of "cause" he uses. In any event, we leave this issue for the reader to decide.

46. *In re Adana Mortgage Bankers, Inc.*, 12 B.R. 989, 1009 (Bankr. N.D. Ga. 1980); *see also* Marshall E. Tracht, *Contractual Bankruptcy Waivers: Reconciling Theory, Practice and Law*, 82 CORNELL L. REV. 301 (1997); Adams & Baillie, *supra* note 20.

47. Tracht, *supra* note 46, at 307.

48. See Bruce White, *The Enforceability of Pre-Petition Waivers of the Automatic Stay*, AM. BANKR. INST. J., Jan. 15, 1996, at 26.

one direction. While refusing to enforce waivers may promote reorganizations in the context of bankruptcy cases, it may discourage ultimate rehabilitation of many entities by discouraging workouts, which are a cheaper and probably more effective means of rehabilitation. Waivers may be an effective and necessary part of many rehabilitation efforts. In any event, as will be shown, even where the promotion of reorganization policy applies, there are countervailing policies.

A policy favoring fair and equal distribution of assets to creditors is sometimes said to preclude waivers of bankruptcy privileges.<sup>49</sup> While a waiver of the ability to file bankruptcy may cause problems of fair and equal distribution of assets to creditors of equal priority (even this is questionable since creditors could file an involuntary case regardless of any waiver of privileges by the debtor), this is not the case regarding waiver of the stay or of a discharge. In either of these latter cases, the assets of the debtor (including any equity in property to be sold by a foreclosing creditor not subject to the stay) are still within the control of the bankruptcy court and are distributed according to the priority scheme of section 507<sup>50</sup>—presumably equally and fairly.

Even if one accepts these policies as weighing against enforcement of waivers, there are countervailing and opposing policies. For example, one policy oft spoken of favors workout agreements where these waivers frequently occur.<sup>51</sup> Another idea is that the property and other rights of parties in bankruptcy are generally determined with reference to state law.<sup>52</sup> As a result, one can argue that contractual waivers, like other property attributes of the estate, should be analyzed simply as a matter of state law. Therefore, if a waiver is enforceable under state contract law, it should be enforced in bankruptcy. In a similar vein, there is the longstanding policy in Anglo-American jurisprudence of freedom of contract that is promoted by enforcing waivers.<sup>53</sup> Economic efficiency policies also support enforcement of waivers at least in certain circumstances.<sup>54</sup>

The point here is that there are policies that weigh on each side of the issue of whether waivers of bankruptcy privileges should be enforced. The Supreme Court has stated that public policy concerns cannot be used to invalidate

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49. *In re Sky Group Int'l, Inc.*, 108 B.R. 86, 88 (Bankr. W.D. Pa. 1989); *see* Rafeal Efrat, *The Case for Limited Enforceability of a Pre-Petition Waiver of the Automatic Stay*, 32 SAN DIEGO L. REV. 1133 (1995); William Basin, *Why Courts Should Refuse to Enforce Pre-Petition Agreements that Waive Bankruptcy's Automatic Stay Provision*, 28 IND. L. REV. 1 (1994). Even this is questionable since creditors could file an involuntary case regardless of any waiver of privileges by the debtor. These include any equity in property to be sold by a foreclosing creditor not subject to the stay.

50. 11 U.S.C. § 507 (1994).

51. *See* Basin, *supra* note 49, at 6; Adams & Baillie, *supra* note 20, at 11.

52. *Butner v. United States*, 440 U.S. 48, 54-55 (1979); *Taylor v. Voss*, 271 U.S. 176 (1926); *Connolly v. Baum*, 22 F.3d 1014, 1017 (10th Cir. 1994); *Boyd v. United States*, 11 F.3d 59, 60-61 (5th Cir.), *cert. denied*, *Boyd v. Galsby*, 511 U.S. 1107 (1994); *see also* THOMAS G. KELCH & MICHAEL K. SLATTERY, *REAL PROPERTY ISSUES IN BANKRUPTCY* § 2.02[2] (1997).

53. *See* Adams & Baillie, *supra* note 20, at 26-27.

54. *See* Tracht, *supra* note 46.

contractual provisions, unless there are policies in existing laws and precedents that demonstrate a "well defined and dominant policy" against contract enforcement.<sup>55</sup> Given the opposing policies and conflicting precedent, as well as the Supreme Court's restrictive stand on when private agreements can be found unenforceable due to public policy concerns, it does not seem that there is sufficient policy horsepower to overcome contractual waivers on policy grounds.<sup>56</sup>

4. *Myth No. 4: Waivers of Bankruptcy Privileges are Tantamount to Waiving the Ability to File Bankruptcy.*—The courts generally start from the premise that a debtor's agreement not to file bankruptcy should not be enforced. A number of reported cases cite *Fallick v. Kehr*<sup>57</sup> for this rule. Courts then argue that, if waivers are enforced, every contract will be drafted to waive a debtor's rights in bankruptcy. *In re Adana Mortgage Bankers, Inc.*,<sup>58</sup> an early Bankruptcy Code case, stated:

If an advance waiver of the right to file a bankruptcy case were enforceable, the availability of Bankruptcy Code benefits could be nullified in most commercial cases merely by the lender's inclusion of a waiver clause in the standard form of contract it requires of the borrower. The lending community, including federal agencies, through the provisions of their forms of credit instruments, would determine the extent, if any, of access to the bankruptcy courts rather than the statute itself.<sup>59</sup>

Judge Norton's opinion in *Adana* did not mince words on this question. The debtor "had an inviolate right of access to the courts of bankruptcy" and the consequences of the waiver of that right "are almost unthinkable."<sup>60</sup> Such a waiver, "even a bargained for and knowledgeable one," is void.<sup>61</sup>

*In re Madison*,<sup>62</sup> another recent case citing *Fallick*, accepted the same reasoning:

Enforcement of even an agreement which only temporarily waives such rights would appear sufficient to us to undermine the Congressionally-expressed public policy underpinning the Bankruptcy Code . . . . As a matter of policy, it has been pointed out that, if agreements prohibiting

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55. *United Paperworkers v. Misco*, 484 U.S. 29, 43-44 (1987).

56. The Supreme Court precedent on this issue, as well as the Court's view of the significance of public policy arguments, will be discussed in detail in Part III.B.2, *infra*. It is sufficient now to note that there are difficulties with the policy arguments advanced against waivers and that there are substantial countervailing policies.

57. 369 F.2d 899 (2d Cir. 1966).

58. 12 B.R. 989 (Bankr. N.D. Ga. 1980).

59. *Id.* at 1009.

60. *Id.*

61. *Id.*

62. 184 B.R. 686 (Bankr. E.D. Pa. 1985).

bankruptcies were given force, the Code could be nullified in the vast majority of debts arising out of contracts . . . . Even bargained-for and knowing waivers of the right to seek protection in bankruptcy must be deemed void.<sup>63</sup>

This is a particularly strong statement considering the equities of the *Madison* case. The creditor was seeking to enforce an agreement in the debtor's fourth chapter 13 case that if an anticipated fifth filing were dismissed—an event that came to pass—the debtor would not file a sixth case.

If the idea that a debtor cannot waive the right to file bankruptcy is accepted, it is thought to be a close question whether agreements for relief from stay have the same effect. For that reason, some courts have held that stay waivers draw particular scrutiny in single asset cases. If enforced, it is said the practical consequences are the same as a prohibition against filing. As the court in *In re Jenkins Court Associates*<sup>64</sup> explained:

Technically speaking, a waiver of the protection of the automatic stay can be distinguished from a blanket prohibition against a bankruptcy filing. In this context, however, it may be a distinction without a meaningful difference. In single asset cases, public policy behind the stay may frequently outweigh policy which favors encouraging out of court restructuring and settlements.<sup>65</sup>

But other courts have disagreed:

[D]ebtor still retains the benefits of the automatic stay as to the other creditors, as well as all the other benefits and protections provided by the Bankruptcy Code including but not limited to the right to conduct an orderly liquidation, discharge debt or pay it back on different terms, assume or reject executory contracts, sell property free and clear of liens, and pursue preferences and fraudulent conveyances. Debtor still retains the core rights under the Bankruptcy Code and has the ability to make a "fresh start." Therefore, enforcing Debtor's agreement does not violate the public policy concerns that agreements which prohibit a borrower from filing for bankruptcy violate.<sup>66</sup>

This seems the better reasoned view. Bankruptcy law provides a number of privileges. Waiver of any one of these privileges does not amount to waiver of all of them. While it is true that some privileges are of more value to some debtors than others, this does not affect the existence and general value of all of the privileges.

As is shown in the development of the main thesis of this Article, whether

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63. *Id.* at 690-91.

64. 181 B.R. 33 (Bankr. E.D. Pa. 1995).

65. *Id.* at 36.

66. *In re Club Tower, L.P.*, 138 B.R. 307, 311-12 (Bankr. W.D. Ga. 1991); *accord In re Atrium High Point Ltd. Partnership*, 189 B.R. 599, 607 (Bankr. N.C. 1995).

a stay waiver is tantamount to waiving the right to file bankruptcy is irrelevant since, when properly analyzed, waivers of the ability to file bankruptcy should be enforceable.

5. *Myth No. 5: Waivers of Bankruptcy Privileges Violate the Rights of Third Parties.*—It is not infrequently argued that waivers of bankruptcy privileges somehow impinge upon the rights of third parties.<sup>67</sup> This argument is generally directed at waivers of the stay. Underlying this argument is the idea that somehow creditors that are not parties to a waiver agreement have some property or other interest in the debtor's ability to file bankruptcy.

For instance, *In re Pease*<sup>68</sup> holds that stay waivers are *per se* unenforceable because, among other reasons, enforcement of the waiver would allow a single creditor and the debtor to opt out of the "collective" remedy of bankruptcy to the detriment of the debtor's other creditors. The court in *In re Sky Group International, Inc.*<sup>69</sup> expressed the same concerns:

The contention that this "waiver" is enforceable and self-executing is without merit . . . .

. . . .

The legislative history makes clear that the automatic stay has the dual purpose of protecting the *debtor and all creditors* alike . . . .

. . . .

To grant a creditor relief from stay simply because the *debtor* elected to waive the protection afforded the debtor by the automatic stay ignores the fact that it also is designed to protect *all creditors* and to treat them *equally*. The orderly liquidation procedure contemplated by the Code would be placed in jeopardy, especially where (as here) none of the creditors who brought the involuntary petition was a party to the Agreement in which the debtor allegedly waived its right to the automatic stay.<sup>70</sup>

Several appellate decisions have said in dicta that the stay cannot be "waived" because it is intended to benefit other creditors as well as the debtor, and the debtor is not free to waive the rights of these creditors. Based on this kind of analysis of waiver of the stay, some courts have held that a stay waiver should bind the debtor but should not prevent the debtor's third party creditors from contesting its enforcement: "These agreements do not oust this Court's

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67. *Commerzbank v. Telewide Sys., Inc.*, 790 F.2d 206, 207 (2d Cir. 1986); *Maritime Elec. Co. v. United Jersey Bank*, 959 F.2d 1194, 1204 (3d Cir. 1991); *In re Pease*, 195 B.R. 431 (Bankr. D. Neb. 1996); *In re Sky Group Int'l, Inc.*, 108 B.R. 86 (Bankr. W.D. Pa. 1989).

68. *In re Pease*, 195 B.R. at 431.

69. 108 B.R. 86 (Bankr. W.D. Pa. 1989).

70. *Id.* at 88-89 (emphasis in original).

jurisdiction to hear objections to stay relief filed by other parties in interest. It simply means that this Court will give no weight to a Debtor's objection as this conflicts with and is in derogation of the previous agreement."<sup>71</sup>

At first blush, the argument that stay waivers violate third party rights has some appeal. It breaks down on closer analysis. The argument incorrectly assumes that before the debtor files bankruptcy, all of its creditors have some legally protected expectation or property right in the potential future benefits of the debtor's automatic stay. As a practical matter, we think the argument grossly exaggerates creditors' actual expectations. It is very unlikely that creditors actually rely on the potential benefit of the stay when they extend credit. A well-counseled unsecured creditor's expectation is that an encumbered asset can be foreclosed out and that the foreclosing lender will acquire the asset by a credit bid. Junior secured creditors further assume that their interests can be foreclosed out. They are also able to, and routinely do, research public records before they lend and read senior encumbrances to look for stay waivers.

The argument also exaggerates the impairment of other creditors' legal positions. Suppose that a stay waiver is enforced. Other creditors' substantive rights under state law are not changed by this waiver. If the unsecured creditor wants to protect its claim to any equity in a property being foreclosed upon, it can pay off the lender and subrogate to the lender's claim. It can also protect its interest by advancing funds to reinstate the debt or by paying off the debt and foreclosing itself. Other creditors can also exercise their own rights under the bankruptcy law. If the property really has equity and the junior secured creditors are cash poor, they can file their own cases and might be able to stay the senior's foreclosure.

The legislative history of section 362 does support the idea that the stay protects not only the debtor but also the debtor's creditors. But when Congress said this, what it had in mind was assuring a ratable distribution among the debtor's unsecured creditors:

The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors.

....

The automatic stay also provides creditor protection. Without it, certain creditors would be able to pursue their own remedies against the debtor's property. Those who acted first would obtain payment of their claims in preference to and to the detriment of other creditors . . . .<sup>72</sup>

The enforcement of pre-bankruptcy agreements to allow secured creditors to exercise their contractual remedies does not run afoul of this policy. Secured

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71. *In re Cheeks*, 167 B.R. 817, 819 (Bankr. D. S.C. 1994); *accord In re Atrium High Point Ltd. Partnership*, 189 B.R. at 607.

72. H.R. REP. NO. 95-595, 95th Cong. 1st Sess., at 340 (1977).

creditors have a contractual right, which is honored in the bankruptcy process, to be paid in full from the proceeds of their collateral before unsecured creditors get a penny. The above-quoted policy is meant to prevent a race to the courthouse by unsecured creditors resulting in piecemeal dismemberment of the unencumbered portion of the estate.

The current case law transports this legislative history into a completely different context to suggest that the stay should protect some sort of residual right of junior secured and unsecured creditors in a debtor's encumbered assets. Nothing in the legislative history supports that interpretation.

When looked at closely, it is bizarre to suggest that creditors have some proprietary or other interest in a debtor's ability to file a bankruptcy petition and get the benefit of the automatic stay. A debtor could obviously refuse to file for bankruptcy relief even if it was in the debtor's best interest to do so, and a creditor does not and should not have anything to say about this. Moreover, Congress specifically provided a right to file an involuntary petition to provide some measure of protection for creditors in a situation where a debtor's assets may be inequitably dismembered.<sup>73</sup> It is, then, an unwarranted claim that creditors have an interest in a debtor's ability to file bankruptcy or any of the privileges attendant thereto.

6. *Myth No. 6: Waivers Give Unconscionable Advantage to Creditors.*—Creditor leverage is a real concern for the courts. The hidden premise in many current cases is that creditors have superior bargaining power and should not be permitted to use it to their advantage against debtors. From this assumption, the courts reason that, if waivers of bankruptcy privileges are enforced, they will appear in every consumer credit and loan document, and no one will receive the benefits of bankruptcy. It has been said, for example: "To rule otherwise would encourage lenders to adopt standardized waiver terms in loan agreements. This would substantially undercut the relief Congress intended to provide debtors under the Bankruptcy Code."<sup>74</sup>

Why is this assumption made? The assumption is not supported by evidence, anecdotal or otherwise. Given the expanded lending markets, new types of lending programs, and greater competition in lending that have arisen in the past twenty years, is it not at least as likely that enforceable waivers of bankruptcy privileges would be mere bargaining chips in debtor-lender negotiations?

The traditional thinking is premised on a notion that lenders have so great a bargaining advantage that they can dictate all of the important terms of a loan transaction. This assumption is likely not true for commercial lending. Generally, parties to commercial lending transactions truly bargain over terms of loan agreements. The claimed lender bargaining advantage may also not be true for residential mortgage and other types of lending. In the case of residential mortgage lending, the terms of mortgage loans are typically set out in uniform documents prepared by secondary market loan buyers such as the Federal National Mortgage Association, who, for policy reasons, might not push for stay

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73. 11 U.S.C § 303 (1994).

74. *In re Pease*, 195 B.R. 431, 435 (Bankr. D. Neb. 1996).

waivers. Mortgage lenders might simply require the waiver of less credit worthy buyers or demand a higher interest rate or more loan points for loans without the waiver. Federal legislation designed to assure access to consumer credit, such as the Community Reinvestment Act<sup>75</sup> and the Fair Housing Act,<sup>76</sup> doubtlessly has improved borrowers' relative leverage. Further, the growth of non-bank financial institutions that will lend to less credit worthy borrowers reduces the bargaining strength of lenders. However, in the final analysis, no one really knows whether waiver clauses would become the norm. The premise of the current case law that such clauses would become universal is just a guess by the courts.

On the other side of the equation are a number of possible benefits of allowing waivers of bankruptcy privileges. Debtors who choose to take the risk of waiving their rights may be able to obtain better credit terms, including lower points and reduced interest rates, in return for agreeing to waive privileges in the event of bankruptcy. These results may very well occur in both business and consumer markets. Thus, the credit markets may simply absorb the reality of enforceable waivers as a means of offering new and economically beneficial loan programs. It should also be noted that there are mechanisms in contract law to protect against terms that result from unequal bargaining power. Where there is an imposition due to unequal bargaining power, the law pertaining to unconscionability and adhesion contracts can protect borrowers.<sup>77</sup>

In short, the assumption that there will be unconscionable results from permitting waivers of bankruptcy privileges is just that—an assumption. It is equally arguable that such results will not occur, and, in fact, that there will be positive results from permitting enforcement of waivers of bankruptcy privileges for both consumers and business debtors as a result of the creation of new products in the credit markets.

### *C. The Sources of the Mythology*

The courts have historically been solicitous of borrowers' rights. We believe this attitude, which is reflected in the current bankruptcy case law on waivers, is a carry over from the depression. During the depression, the federal and state legislatures enacted new legislation to protect the rights of necessitous borrowers. The Frazier-Lemke Act amendments to the Bankruptcy Act<sup>78</sup> are an important example. As originally enacted, the Act enabled a defaulting farm mortgagor to stay foreclosure and retain possession for five years by payment of the judicially-determined fair rental value of the farm, then purchase the farm for its appraised value at the end of the stay period. The Supreme Court in *Louisville*

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75. 12 U.S.C. §§ 2901-2907 (1994).

76. 42 U.S.C. §§ 3601-3631 (1994 & Supp. I 1995).

77. *See infra* Part IV.C.

78. The Frazier-Lemke Act, ch. 869, 48 Stat. 1289 (1934) (formerly codified at 11 U.S.C. § 203(s)) (repealed 1949) (adding Subsection (s) to section 75 of the Bankruptcy Act); *see* WILLIAM L. NOSTON, JR., NORTON BANKR. L. & PROC. § 97:7 (2d ed. 1983 & Supp. 1998).

*Joint Stock Bank v. Radford*<sup>79</sup> held that the Act violated the mortgagee's Fifth Amendment protection against appropriation of property rights without just compensation.<sup>80</sup> However, *Wright v. Vinton Branch of the Mountain Trust Bank*,<sup>81</sup> the Court upheld the Act after it was amended on August 28, 1935, to eliminate the mortgagor's right to redeem for appraised value, to reduce the duration of the distressed mortgagor's stay to three years, and to authorize the court to terminate the stay on certain conditions.<sup>82</sup>

Some states adopted similar reforms. *Home Building & Loan Ass'n v. Blaisdell*<sup>83</sup> dealt with a Minnesota debtor relief statute that authorized courts to extend a mortgagor's redemption period for so long as the court determined "equitable and just" and authorized the mortgagor to retain possession in exchange for payment of a judicially-determined fair rental value. An institutional lender alleged that the statute ran afoul of the constitutional prohibition of state laws that impair contractual obligations. The Supreme Court upheld the statute as a reasonable legislative response to borrowers facing desperate economic conditions:

An emergency existed in Minnesota which furnished a proper occasion for the exercise of the reserved power of the state to protect the vital interests of the community. The declarations of the existence of this emergency by the legislature and by the Supreme Court of Minnesota can not be regarded as a subterfuge or as lacking in adequate basis. . . . As the Supreme Court of Minnesota said, the economic emergency which threatens "the loss of homes and lands which furnish those in possession the necessary shelter and means of subsistence" was a "potent cause" for the enactment of the statute.<sup>84</sup>

States also enacted limitations on deficiency judgments following mortgage foreclosures.<sup>85</sup> During the depression, the California legislature enacted a comprehensive set of rules to limit the personal liability of a real property mortgagor.<sup>86</sup> The California appellate courts consistently refused to enforce

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79. 295 U.S. 555 (1935).

80. *Id.* at 602.

81. 300 U.S. 440 (1936).

82. *Id.* at 460-61.

83. 290 U.S. 398 (1933).

84. *Id.* at 444-45.

85. See *Radford*, 295 U.S. at 594 n.24 (identifying legislation then-recently enacted in several states).

86. See CAL. CIV. PRO. §§ 580(a), (b) & (d), 726 (West 1998). Section 726 required that a note secured by real property be enforced by foreclosure, section 580(d) and (b) prevented, respectively, a money judgment for the unpaid balance of a real-property secured note following non-judicial foreclosure of real property collateral and following any foreclosure of a purchase money loan, and section 580(a) required that an action for a deficiency judgment be brought within three months of foreclosure. Sections 726, 580(a), and (b) were enacted in 1933. Section 580(d) was enacted in 1940.

advance waivers of these protections.<sup>87</sup> *California Bank v. Stimson*<sup>88</sup> provides a good example of the judicial mind set of the time:

We are persuaded that section 580a of the Code of Civil Procedure was enacted by the Legislature for the purpose of relieving mortgage and trust deed debtors. That the debtor class in California constitutes a substantial portion of the state's population cannot be doubted. The code section with which we are here concerned, like other statutes, was adopted to promote the public welfare by shielding the debtor class from oppression. It must therefore be construed as declarative of a public policy of the state and cannot be waived by contract (*Winklemen v. Sides*, 31 Cal.App.2d 387, 409 [88 P.2d 147]; Civ. Code, §§ 3268, 3513). That the statute here in question is not a law intended for the benefit of the person immediately concerned and can by him be waived (Civ. Code, § 3513), but was enacted for a public reason and as a declaration of public policy is evidenced by the following statement of the Supreme Court in the case of *Hatch v. Security-First National Bank*, 19 Cal.2d 254, 259 [120 P.2d 869]:

The evil which led to the enactment of this legislation became pronounced during the recent period of economic depression when creditors were frequently able to bid in the debtor's real property at a nominal figure and also to hold the debtor personally liable for a large proportion of the original debt.

....

The purpose and intendment of section 580a of the Code of Civil Procedure were thus set forth in *Reynolds v. Jensen*, 14 Cal.App.3d 558, 559 [58 P.2d 687]: "These enactments were a part of a legislative plan to lighten the burdens of trust deed debtors as evidenced by numerous changes made in the laws at the same session of the legislature."

We are satisfied that section 580a of the Code of Civil Procedure is a law adopted for a public reason and comes within the purview of section 3513 of the Civil Code which provides that the provisions of such a law cannot be waived by a private agreement. Any other holding would manifestly result in a loss of much of the effectiveness of the statute. Indeed, if the debtor could be permitted to waive the provisions

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87. See *Winklemen v. Sides*, 88 P.2d 147 (Cal. Ct. App. 1939); *California Bank v. Stimson*, 201 P.2d 39, 41 (Cal. Ct. App. 1949); *Freedland v. Greco*, 289 P.2d 463 (Cal. Ct. App. 1955); *Valinda Builders, Inc. v. Bissner*, 230 Cal. App. 2d 106, 112 (1964). Each of these courts refused to enforce purported waivers of the debtor's rights under the California Code of Civil Procedure. CAL. CIV. PRO. §§ 580(a), (b) & (d), 726 (West 1998).

88. 201 P.2d 39 (Cal. Ct. App. 1949).

of the statute, the effect of the section could be entirely nullified.<sup>89</sup>

This excerpt is also a good example of how a broadly-worded exception can eclipse the general rule. The line between statutory rights “intended for the benefit of the person immediately concerned” that can be waived and rights “enacted for a public reason” that cannot is far from clear.<sup>90</sup> At least the court was able to find some then-recent anecdotal support for its holding in the legislative history.<sup>91</sup>

We believe that the depression-era courts used the public policy wild card to show paternalism towards borrowers in a time of emergency. The perception was that borrowers lacked economic clout and needed protection from their lenders. At that time, this attitude was supported both by the actual economic conditions and by the actions of the state and federal legislatures. We think that a lot of the current judicial aversion to stay waivers is tied to this sort of thinking and the precedent of the time, but this attitude lacks support in current economic conditions or recent legislation.

With respect to stay waivers, the enforcement of such waivers does not violate any long-standing and deep-rooted principle of the bankruptcy law. Before the enactment of the Bankruptcy Reform Act of 1978, a bankruptcy filing did not trigger an automatic stay of lien foreclosures. Typically, the courts created stays through court orders. The Bankruptcy Act of 1898 provided a limited automatic stay of certain actions in “straight” (liquidation) bankruptcies. Section 11<sup>92</sup> and Rule of Bankruptcy Procedure 401 stayed the commencement or continuation of an action to prove or enforce unsecured, dischargeable debts. Section 814, which was part of Chapter XII (the Real Property Arrangement Chapter of the Bankruptcy Act) provided that:

The court may, in addition to the relief provided by section 29 of this title and elsewhere under this chapter, enjoin or stay until final decree the commencement or continuation of suits against a debtor and may, upon notice for cause shown, enjoin or stay until final decree any act or the commencement or construction of any proceeding to enforce any lien upon any property of a debtor.<sup>93</sup>

Stays under the Bankruptcy Act were not “automatic.”

Recent legislation suggests that public policy has shifted away from borrower protection. The Bankruptcy Reform Act of 1994<sup>94</sup> is the best example. The Reform Act made several amendments to benefit creditors. Some of the more important amendments narrow the scope of a debtor’s protections under the

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89. *Id.* at 41.

90. *Id.*; see also *infra* Part III.B.1.

91. *California Bank*, 201 P.2d at 41.

92. 11 U.S.C. § 29 (repealed 1978).

93. *Id.* § 814.

94. Pub. L. No. 103-394, 108 Stat. 4106 (1994).

automatic stay. It added a new ground for relief from stay,<sup>95</sup> added exceptions to the stay,<sup>96</sup> and expedited the resolution of motions for relief from stay.<sup>97</sup> State law has also moved to protect creditors.<sup>98</sup>

The recently-introduced McCollum-Grassley Responsible Borrower Protection Bankruptcy Act<sup>99</sup> would go much farther to shift the balance in favor of creditors. It would require an individual debtor to seek relief under chapter 13, rather than chapter 7, if the debtor's monthly income is at least 75% of the national median average and the debtor's projected monthly net income would enable him or her to pay secured and priority debt and repay at least 20% of unsecured debt in a five year plan.<sup>100</sup> Also, it limits a debtor to chapter 7 discharge no more frequently than every ten years and chapter 13 discharge to no more frequently than every five years.<sup>101</sup> Like the Bankruptcy Reform Act of

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95. *See* 11 U.S.C. § 362(d)(3) (1994). The statute provides that the stay will terminate 90 days from the commencement of a "single asset real estate" case unless the court extends the stay for cause, the debtor has filed a plan with a reasonable possibility of confirmation within a reasonable time, or the debtor has commenced payments which provide its mortgagee with a reasonable return on the value of its collateral. *Id.*

The rule applies to cases in which a single property or project (other than residential property with fewer than four units) on which the debtor conducts no "substantial business . . . other than the business of operating the real property and activities incidental thereto": (a) is encumbered by liquidated, noncontingent debt of not more than \$4,000,000; and (b) generates substantially all of the debtor's gross income. *Id.* § 101(51B).

96. *See id.* § 362(b)(2) (proceeding to establish paternity or to establish alimony, support, or maintenance and collect from sources other than estate); *id.* § 363(b)(3) (act to continue perfection of security interest); *id.* § 362(b)(9) (tax audit, issuance of notice of deficiency, demand for tax returns, assessment and demand for payment); *id.* § 362(b)(18) (attachment of *ad valorem* property tax lien).

97. *See id.* § 362(e) (requiring that the final hearing on a motion for relief from stay be concluded, not merely commenced, within 30 days of the conclusion of the preliminary hearing).

98. The California legislature has recently enacted several bills to protect the interests of secured creditors. Assembly Bill 3101 (effective January 1, 1995) amends California Civil Code to abrogate an appellate court holding (*Cathay Bank v. Lee*, 18 Cal. Rptr.2d 420 (Cal. Ct. App. 1993) (requiring very specific language to waive certain rights of a guarantor of real property-secured debt)); Senate Bill 1612 (effective September 16, 1994) amended section 2856 of the Code of Civil Procedure § 580 to abrogate an appellate court holding (*Western Security Bank, N.A., v. Superior Court*, 25 Cal. Rptr. 2d 908, 910 (1994) (holding that a lender who demanded payment of a letter of credit following the non-judicial foreclosure of its real property security was seeking recovery akin to a deficiency judgment)); Assembly Bill 2585 (effective January 1, 1997) established that a guarantor of a real property-secured debt could waive its rights under a then-recent appellate decision (*Bank of Southern California v. Dombrow*, 46 Cal. Rptr. 2d 656 (Cal. Ct. App. 1995) (limiting guarantor's liability after judicial sale to the difference between the fair value of the collateral and the amount of the guaranteed debt)).

99. H.R. 2500, 105th Cong., 1st Sess. (1997) (introduced September 18, 1997).

100. *Id.*

101. *Id.* § 121(1) & (2).

1994, the McCollum-Grassley bill narrows the scope of the automatic stay.<sup>102</sup> It provides that, in an individual case, the stay will terminate thirty days from filing if the debtor filed a previous case within the preceding twelve months which was dismissed.<sup>103</sup> To extend the stay, a party in interest must move for a determination that the subsequent case was filed in good faith.<sup>104</sup> The bill would also expressly authorize the bankruptcy court to grant "*in rem*" relief from a stay against the debtor and, under certain circumstances, against third parties who later acquire an interest with knowledge of the *in rem* order.<sup>105</sup>

The proposed legislative findings clearly show how far the current mood has swung from debtor protection:

The Congress finds the following:

(1) Record numbers of consumer debtors are filing for bankruptcy relief, and the number of consumer debtors who do so are projected to continue to increase.

(2) The present consumer bankruptcy provisions of the Bankruptcy Code encourage debtors to avoid their financial and moral responsibilities by giving too generous relief to debtors with ability to pay some part of their debts. The cost of credit is unnecessarily increased by such relief to the disadvantage of responsible American consumers.

(3) The present consumer bankruptcy provisions of the Bankruptcy Code have lessened the protection which historically has been given to secured credit. Such protection encourages availability and lowers the cost of such credit to responsible American consumers.

(4) The present procedural provisions of the Bankruptcy Code unnecessarily impose high administrative and participation costs upon creditors whose borrowers file for consumer bankruptcy relief.

(5) The basic relief available for debtors under the present Bankruptcy Code is reasonable and necessary for those whose financial circumstances justify such relief.<sup>106</sup>

Though H.R. 2500 has not been enacted,<sup>107</sup> Representative McCollum and others introduced a more comprehensive bankruptcy reform bill, H.R. 3150, in

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102. *Id.* § 109.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* § 2.

107. The Subcommittee on Commercial and Administrative Law held hearings on March 10, 1998.

early 1998.<sup>108</sup> H.R. 3150 proposes an almost identical means-based test for Chapter 7 relief as did H.R. 2500<sup>109</sup> with the same limitations on frequency of discharge<sup>110</sup> and the same early termination of the stay for if the debtor filed then dismissed a bankruptcy case in the previous year.<sup>111</sup> It also proposes many additional creditor protections.<sup>112</sup> For example, in individual cases, a debtor would not be eligible for any form of bankruptcy relief unless, within the preceding ninety days, he or she has made a good faith attempt to create a non-bankruptcy debt repayment plan.<sup>113</sup>

While this legislation and the legislative findings are merely proposed, they reflect a movement in public policy-evident in the Bankruptcy Reform Act of 1994 and acts of other legislatures-away from debtor protection and toward recognition of legitimate economic concerns of lenders.

The bankruptcy courts need to take note of current public policy, as reflected by the actions of the legislatures, and rid themselves of depression-era attitudes that we believe are at the bottom of the cases prohibiting and limiting waivers of bankruptcy privileges. Once they do so, we believe they will evaluate waivers of bankruptcy privileges in a more objective and legally apropos light.

## II. THE LAW OF WAIVER

Having found that the present law concerning waiver of bankruptcy privileges is founded on faulty or exaggerated premises rooted, perhaps, in the attitudes of depression-era America, we must now determine a suitable method of analyzing such waivers. To do this, we will evaluate the law of waiver as it is applied in other areas of the law. In this regard we will look at the law of waiver as it relates to waivers of constitutional, statutory, and common law rights and privileges.

Before engaging in this analysis, it is instructive to notice what the true problem is here. As has been shown, the issue is not one of waiver of constitutional rights.<sup>114</sup> It is also not an issue of waiver of a statutory right.<sup>115</sup> At best, what is involved is the waiver of certain statutory privileges provided by the Bankruptcy Code.

Thus, the question is: When can a statutory privilege properly be waived?

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108. H.R. 3150 was passed in the House on June 10, 1998.

109. Section 101 of H.R. 3150 sets a slightly more lax threshold for Chapter 7 relief than H.R. 2500. A debtor will be eligible unless, among other things, he or she has monthly income of not less than the *highest* national median family income reported for a family of the same or lesser size.

110. H.R. 3150, § 171.

111. *Id.* § 122.

112. Subtitles C, D and E of Title 1 propose new "Adequate Protections" for, respectively, secured creditors, unsecured creditors, and lessors.

113. H.R. 3150, § 104.

114. *See supra* Part III.A.

115. *See supra* Part III.B.

If there is a restriction on waiver of such a privilege, it would need to be a constitutional, statutory or common law one. But as we have seen, there is no significant restriction on waiver of bankruptcy privileges as a constitutional or statutory matter. Thus, if there is a restriction on such waivers, it must arise from otherwise applicable law, which leaves us with the common law. Here the law of contract is the relevant law that applies. As a result, the ultimate question is: when can statutory privileges be waived by contract?

#### *A. Waiver of Constitutional Rights*

Many people would probably be astonished at how easily fundamental constitutional rights may be waived. The general rule is that one may waive a constitutional right by "intentional relinquishment or abandonment of a known right or privilege."<sup>116</sup> In the criminal context, it is often said that waivers of constitutional rights must be "voluntary, knowing and intelligent."<sup>117</sup> While it is not entirely clear whether waivers of constitutional rights in the civil context must meet these standards, the cases that discuss the issue at least assume this to be the case.<sup>118</sup>

1. *The Privilege Against Self Incrimination*.—When one looks beyond general principles to specific cases, it becomes evident how easily one's fundamental constitutional rights may be waived. In the criminal context, the privilege against self incrimination may be waived, and this waiver need not even be explicit; it can be inferred from the circumstances.<sup>119</sup> It has even been held that silence combined with an understanding of one's rights is enough to constitute a waiver of this privilege.<sup>120</sup> Psychological pressure, such as police speaking about the impact of a defendant's actions and publicity from those actions on his or her family, can be applied in connection with obtaining a waiver of the self-incrimination privilege.<sup>121</sup> There is even some authority to the effect that the self incrimination privilege can be waived by prior agreement.<sup>122</sup> In the case of *Paramount Pictures Corp. v. Miskinis*, the concurring opinion states that it is possible, at least in the context of business agreements, for a party to waive by prior agreement the self incrimination privilege as it relates to business records.<sup>123</sup>

2. *Searches and Seizures*.—One can waive the immunity from warrantless

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116. *Johnson v. Zebst*, 304 U.S. 458, 464 (1937).

117. *D.H. OverMyer Co. v. Frick Co.*, 405 U.S. 174, 185 (1972).

118. *Id.*; *see also Fuentes v. Shevin*, 407 U.S. 67, 94-95 (1972); *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 393-94 (1937).

119. *North Carolina v. Butler*, 441 U.S. 369, 374 (1979).

120. *Id.* at 373; *see also People v. Nunez*, 579 N.Y.S.2d 959, 961 (N.Y. App. Div. 1992).

121. *United States v. Barnett*, 814 F. Supp. 1449, 1457 (D. Alaska 1992).

122. *Paramount Pictures Corp. v. Miskinis*, 344 N.W.2d 788, 807-09 (Mich. 1984) (Levin, J., concurring).

123. *Id.*

and unreasonable searches and seizures under the Fourth Amendment.<sup>124</sup> Such a waiver occurs upon consent to a search and the validity of such consent as a waiver of constitutional rights is determined from the totality of the circumstances.<sup>125</sup> An interesting fact about consent in this context is that it is not the voluntariness of the consent itself that is determinative of the validity of the waiver, but rather the reasonableness of the belief of the officer that a valid consent has been given.<sup>126</sup> Thus, a voluntary and willing consent to waive rights need not actually be given; the question is whether the officer reasonably believed that there was such consent.

The circumstances in which such searches have been permitted shows the ease of such a consent. The consent, as in the case of waiver of self incrimination rights, need not be express but may be implied.<sup>127</sup> A person may ratify a search after it has occurred.<sup>128</sup> Consent need not then be prior to the search. In some cases consent may be given by a third party so long as this person has authority to give the consent.<sup>129</sup> For example, an owner of property, one in control of property or one who has joint control over property may be able to consent to a search so that the search is valid against a third party whose property happens to be at the place where the search is conducted.<sup>130</sup> A bailee may consent to a search of a bailor's property if the bailor has assumed the risk of this type of event.<sup>131</sup> A host may consent to a search of premises on which a guest's property is located, but whether the guest's property itself may be searched in such circumstances is determined on a case by case basis.<sup>132</sup>

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124. 79 C.J.S. *Searches and Seizures* §§ 111-127 (1995); *State v. Manns*, 370 N.W.2d 157, 159 (Neb. 1985); *State v. Carsey*, 664 P.2d 1085, 1090 (Or. 1983); *Gant v. State*, 152 So. 710 (Fla. 1934).

125. 79 C.J.S. *Searches and Seizures* § 111 (1995); *see also United States v. Oyekan*, 786 F.2d 832, 838 (8th Cir. 1986); *State v. Juhl*, 449 N.W.2d 202, 208 (Neb. 1989); *State v. White*, 334 S.E.2d 786, 789 (N.C. Ct. App. 1985); *People v. Driscoll*, 449 N.Y.S.2d 809, 812 (N.Y. App. Div. 1982).

126. 79 C.J.S. *Searches and Seizures* § 111 (1995); *see also United States v. Elliott*, 50 F.3d 180, 186 (2d Cir. 1995); *Wilkerson v. State*, 594 A.2d 597, 603-04 (Md. Ct. Spec. App. 1991); *McCray v. State*, 486 So. 2d 1247, 1250 (Miss. 1986).

127. 79 C.J.S. *Searches and Seizures* § 112 (1995); *People v. Rincon*, 581 N.Y.S.2d 293, 296 (N.Y. App. Div. 1992); *State v. Buschkopf*, 373 N.W.2d 756, 768 (Minn. 1985).

128. *Atkins v. State*, 325 S.E.2d 388, 391 (Ga. Ct. App. 1984).

129. 79 C.J.S. *Searches and Seizures* § 113 (1995); *United States v. Matlock*, 415 U.S. 164, 171, (1974); *Daniels v. State*, 534 So. 2d 628, 653 (Ala. Crim. App. 1986).

130. 79 C.J.S. *Searches and Seizures* § 113 (1995); *State v. Greer*, 530 N.E.2d 382, 391 (Ohio 1988); *Ex parte Hilly v. State*, 484 So. 2d 485, 490-01 (Ala. 1986); *State v. Johnson*, 684 S.W.2d 581, 582 (Mo. Ct. App. 1984); *State v. Wimer*, 168 W. Va. 417, 424, 284 S.E.2d 890, 894 (W. Va. 1981).

131. 79 C.J.S. *Searches and Seizures* § 114 (1995); *In re Javier A.*, 206 Cal. Rptr. 386, 392 (Cal. Ct. App. 1984).

132. 79 C.J.S. *Searches and Seizures* § 116 (1995); *Ingram v. State*, 703 P.2d 415, 425 (Alaska 1985).

Even deception may be used to gain entry and search a person's property. For example, use of undercover police to deceive the owner of their true identity in order to gain access to a location and search is appropriate where the scope of the visit is that intended by the consenting party.<sup>133</sup> Generally, these cases involve invitations to undercover police to engage in illegal activity.<sup>134</sup> However, some authority allows deception even as to the purpose of the visit. There are cases allowing undercover police to pose as home buyers who then use this access to search the home.<sup>135</sup> Here, not only is there deception concerning the identity of the party entering the premises, as in the cases noted above, but also there is deception as to the purpose of the visit that purports to be the wholly legal one of inspection of a home by a potential home buyer.

In the case of searches, waiver is determined not by the existence of actual consent, but by an officer's reasonable perception of it. Consent may sometimes be given by third parties, and deception is sometimes permissible in obtaining the consent. Thus, a broad range of circumstances exists in which Fourth Amendment rights may be easily waived.

3. *Right to Counsel*.—The Sixth Amendment right to counsel may also be waived. The standard used is similar to that applied to self-incrimination waivers. But again, as in the case of consent searches, deception of some kinds is allowed. It has been held that recording conversations of a defendant with a third person who was cooperating with the police did not violate the defendant's right to counsel, even though the only explicit waiver of this right by the defendant had occurred two months earlier.<sup>136</sup>

The point of discussing waivers of certain constitutional rights is to show that the fundamental constitutional rights that form the foundation for our system of justice and our society can be waived quite easily, even in circumstances where the force of the state is being used to deceive and place psychological pressure on the individual. The standards for waiver are not stringent.

4. *Contractual Waivers of Constitutional Rights*.—One might respond by saying that, although waivers of constitutional rights do occur in the circumstances described, there is a vital difference between these waivers and waivers of bankruptcy privileges. The difference is that waivers of constitutional rights generally occur in the context of a present waiver of an existing right (i.e., a party is given the opportunity at a particular point in time to either waive or not waive a right that exists at that point in time). On the other hand, in the circumstances of a waiver of bankruptcy privileges, the waiver is not a present waiver of an existing right but an anticipatory contractual waiver of a potential future privilege. This serves to distinguish the situations, since we give more credence to the present waiver of an existing privilege than to an anticipatory

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133. 79 C.J.S. *Searches and Seizures* § 120 (1995); *United States v. Bosse*, 898 F.2d 113, 115 (9th Cir. 1990); *People v. Catania*, 398 N.W.2d 343, 346 (Mich. 1986).

134. 79 C.J.S. *Searches and Seizures* § 120 (1995).

135. *Id.*; see also *People v. Jaquez*, 209 Cal. Rptr. 852, 857 (Cal. Ct. App. 1985); *State v. Poland*, 645 P.2d 784, 792 (Ariz. 1982).

136. *Jenkins v. Leonardo*, 991 F.2d 1033, 1038 (2d Cir. 1993).

contractual one made before the privilege may be exercised.

Nonetheless, when carefully analyzed, this distinction does not differentiate bankruptcy waivers from the waivers of constitutional rights. There are many contexts in which we allow the waiver of constitutional rights by means of an anticipatory contractual waiver. For instance, the Supreme Court has decided that due process rights may be anticipatorily waived by contract. The seminal case on this issue is *D.H. OverMyer Co., Inc. v. Frick Co.*,<sup>137</sup> where it was held that procedural due process rights, like the right to a hearing, may be waived in a cognovit note that allows entry of a judgment against a debtor without a hearing or trial on the merits of the claim.<sup>138</sup> Similar results have been obtained in other due process cases.<sup>139</sup>

Likewise, it has been held that First Amendment rights of freedom of speech may be waived by contract. In *Snepp v. United States*,<sup>140</sup> the Court held that a CIA agent had properly waived First Amendment rights to freedom of speech concerning his experiences in the CIA by signing an agreement relating to his employment that precluded him from publishing his experiences without approval of the CIA.<sup>141</sup> This idea has been restated in other cases.<sup>142</sup>

It has even been suggested that self-incrimination rights may be waived contractually, at least in the case of commercial agreements.<sup>143</sup> Thus, not only is it simple to waive fundamental constitutional rights but such waivers may also validly occur by means of an anticipatory contractual waiver.

### *B. Waiver of Statutory Rights and Privileges*

*1. The Standard for Enforcement of Waivers.*—Within certain parameters, statutory rights and privileges may be waived, and these rights and privileges may be waived by contract. The general standard for when such privileges may be waived and when they may not has been stated in many ways, but all of these formulations have a common theme: statutory privileges may not be waived when the statutory privilege was created for the benefit of the general public pursuant to some important public policy.

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137. 405 U.S. 174 (1972).

138. *Id.* at 185.

139. *Bryant v. Jefferson Fed. Sav. & Loan Ass'n*, 509 F.2d 511, 515 (D.C. Cir. 1974) (noting that a person can waive due process rights in an agreement describing a lender's rights to foreclose nonjudicially on property); *Bonner v. B-W Utilities, Inc.*, 452 F. Supp. 1295, 1303 (W.D. La. 1978) (stating that due process rights may be waived but holding that the relevant person in the case had not entered into the contract in question).

140. 444 U.S. 507 (1980).

141. *Id.* at 510 n.3.

142. *Allied Artists Pictures Corp. v. Alford*, 410 F. Supp. 1348, 1354 (W.D. Tenn. 1976) (determining that although one can waive First Amendment rights by agreement, such a waiver by local theaters is not binding on distributors of films). *See generally* G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CAL. L. REV. 433, 479-82 (1993).

143. *See Miskinis*, 344 N.W.2d at 807-09.

It has been said, for instance, that one cannot waive a statutory privilege if the privilege was created for the benefit of the general public.<sup>144</sup> Similarly, it has been stated that a statutory privilege or right may not be waived if such waiver contravenes clearly enunciated public policy.<sup>145</sup> This idea has also been expressed as allowing waiver where the statutory right waived was created for the benefit of individuals and prohibiting waiver where the right was created for a public reason.<sup>146</sup> Other courts have stated the rule more generally, allowing waiver of statutory rights and privileges except when the rights or privileges involve questions of public policy.<sup>147</sup> Even more generally, a statutory right may not be waived where such waiver would violate the public interest.<sup>148</sup> Waiver is also not permissible when waiver would do "violence" to the public purpose of the law.<sup>149</sup>

Distinctions concerning the stringency of requirements for waiver seem to be made depending on the types of rights involved in the particular statutory provision. Statutes dealing with property rights seem to be most amenable to waiver. For instance, a statutory right may be waived when the statute has as its purpose the protection of property rights rather than the protection of the general public.<sup>150</sup> On the other hand, labor law cases appear to make waiver, where permissible, more burdensome by requiring that the waiver be "clear and unmistakable."<sup>151</sup>

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144. *Canal Elec. Co. v. Westinghouse Elec. Corp.*, 548 N.E.2d 182, 187 (Mass. 1990) (stating that waiver of statutory rights is permissible when the statute has the purpose of protection of property rights rather than protection of the general public); *Halsrud v. Brodale*, 72 N.W.2d 94, 99 (Iowa 1955) (noting that statutory rights concerning property drainage may be waived); *Southwestern Bell v. Employment Sec. Review Bd.*, 502 P.2d 645, 651 (Kan. 1972) (confirming that a statutory right that exists to alleviate a possible distress among the public cannot be waived).

145. *Allerton Constr. Corp. v. Fairway Apartments Corp.*, 267 N.Y.2d 860, 862 (N.Y. Sup. Ct. 1966) (finding that a party cannot waive a right conferred by statute if such a waiver "contravenes clearly enunciated public policy").

146. 28 AM. JUR. 2D *Estoppel and Waiver* § 164 (1966); *Benane v. International Harvester Co.*, 142 Cal. App. 2d Supp. 874, 878-79 (Ct. App. Dep't Super. Ct.) (voting law held to be for a public reason and, thus, not subject to waiver); *Evan v. Whicker*, 59 S.W.2d 420, 423 (Tex. App. 1933) (holding that statutory rights of an individual as an individual are waivable).

147. *Ostafin v. State*, 564 N.W.2d 616, 618 (N.D. 1997) (finding that a criminal defendant cannot waive rights to "good time" allowances in criminal sentencing since the policy of prison order is at stake); *Motor Contract Co. v. Van Der Volgen*, 298 P. 705, 707 (Sup. Ct. Wash. 1931) (noting that an agreement making an otherwise non-negotiable document a negotiable one is void and not a waiver of rights to counterclaim); *Wellens v. Beck*, 103 N.W.2d 281, 283 (N.D. 1960) (finding that one can waive statutory right, including a setoff statute, so long as the waiver is not against public policy).

148. 6A CORBIN ON CONTRACTS § 1515, at 728 (1962).

149. *Canal Elec. Co.*, 548 N.E.2d at 187.

150. *Id.* at 187-88.

151. *International Brotherhood of Teamsters v. Southwest Airlines Co.*, 875 F.2d 1129, 1135-36 (5th Cir. 1989); *George Banta Co. Inc. v. NLRB*, 686 F.2d 10, 20 (D.C. Cir. 1982); *Red Bank*

Given the different sorts of "public policy" language used by the courts in setting standards for waiver of statutory rights and privileges, it is not obvious how the standard can be generally described. It cannot be the case that just any public interest at all will make a statutory privilege exempt from waiver. If this were the case, no statutory privilege could be waived since they are all based on some sort of supposed public interest, or the legislature would have no business making the law in the first instance. It is evident then that a non-waivable statutory privilege must be imbued with a high level of public policy interest. The actual outcomes of cases are determined on a case-by-case basis by analyzing whether the public interests involved in the statute rise to this high level. How can this high level of public interest best be described?

It will not be denied that laws enacted specifically to protect public health and physical welfare fall within the rule prohibiting waiver—a high level of public interest exists here. This category explains the reticence of the courts to allow waivers of rights relating to labor laws and those meant to protect against physical injuries. But it is more than health and safety laws that are deemed exempt from waiver. Thus, a health and welfare explanation for the high level of public interest necessary to preclude waiver is too narrow to explain the cases.

Perhaps a better general way to express the standard that has emerged among most courts is to say that a statutory privilege may not be waived when there is a strong public policy for the benefit of the general public underpinning the provision. There are two elements in this formulation: first, there is the necessity of a strong public policy behind the statutory provision; second, this policy must be intended to benefit the general public. These elements are reflective of the case law and conform to the idea that we shall not allow violence to be done to the policies underlying statutory law.

The second aspect of the proposed general standard for analyzing waivers of statutory privileges contains some ambiguity. What is the "general public"? Does the term include everyone, or may it refer to some subset of the general public? Cases dealing with the meaning of "general public" do not completely answer the question. The ordinary definition of the general public includes everyone,<sup>152</sup> but some cases take a more restrictive view of the general public.<sup>153</sup>

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Reg'l Educ. Ass'n v. Red Bank Reg'l High Sch. Bd. of Educ., 393 A.2d 267, 276 (N.J. 1978); *see also* Peter C. Schwartz, *Section 8(d) of the NLRA and the Duty to Decision-Bargain over Work Relocation: Some Observations on Management Rights After Milwaukee Spring II*, 36 SYRACUSE L. REV. 1055, 1068 (1985) (stating that general rule regarding waiver of statutory labor law rights is that such waiver must be "clear and unequivocal" and that the language of waiver must be explicit).

152. *Harvey v. Bell*, 732 S.W.2d 138, 140 (Ark. 1987) (determining that general public means anyone and everyone, each having the right to use property to the full extent for which it is dedicated); *Krebs v. Beltrami County*, 6 N.W.2d 803, 805 (Minn. 1942) (noting that the general "public" said to mean those other than persons in the general vicinity of a street and to include all members of the general public who are represented by the local government); *Rayor v. City of Cheyenne*, 178 P.2d 115, 116 (Wyo. 1947) (stating that the "general public [to whom the land was dedicated] is not confined to the citizens of a municipality, but embraces all the people"). The

Note also that the cited cases defining the general public are not decided in the context of determining the validity of waivers of a statutory privileges. Thus, any answer here is bound to be an extrapolation from cases not precisely on point. We will ultimately analyze the "general public" issue under broad and narrow constructions of its scope.

The proposed two prong standard must, before being applied, be reviewed under recent Supreme Court authority.

2. *The Supreme Court View of Use of Public Policy to Invalidate Contractual Provisions.*—If a court finds that a contractual waiver of a statutory privilege is not enforceable due to the public policy underlying the statute, the court is invalidating the contractual clause on public policy grounds. It is by this route that courts have typically invalidated waivers of bankruptcy privileges. Recent Supreme Court jurisprudence takes a dim view of the invalidation of contractual provisions on public policy grounds.

In an excellent exposition on this issue, Professor G. Richard Shell has analyzed Supreme Court precedent on public policy invalidation of contractual provisions in the *Lochner*, Warren and modern courts.<sup>154</sup> In this analysis, Shell concludes that the modern Supreme Court is more conservative than even the *Lochner* court in refusing to allow invalidation of contractual clauses based upon public policy concerns. The standard applied by the modern Court is that public policy defenses are limited to instances where existing laws and precedents demonstrate a "well defined and dominant policy against" contract enforcement.<sup>155</sup> In the field of invalidation of contractual provisions based on statutory public policies, the Supreme Court "has refused to interpret statutory policies to override private contracts unless literally compelled by Congress to do so."<sup>156</sup>

Shell concludes that in the modern Supreme Court, contract enforcement is a preferred jurisprudential value.<sup>157</sup> It is this value that underlies the Court's jaundiced view of public policy invalidation of contractual provisions. Another motivation of the Supreme Court's view is that economic efficiency is a value to be guarded in determination of these issues and that economic efficiency is generally harmed by invalidation of contractual provisions freely adopted.<sup>158</sup>

The ultimate arbiter of the issue of the validity of waivers of bankruptcy privileges is the Supreme Court. Thus, the standards of the Supreme Court with respect to invalidation of contractual provisions on the grounds of statutory

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group is not represented merely by a city, but "by the legislature of the state." *Id.*

153. *Southern Ind. Gas v. Steinmetz*, 377 N.E.2d 1381, 1383 (Ind. Ct. App. 1977) (finding that general public means "a great multitude of persons who in the course of daily events would be exposed to danger of power lines"); *Plancich v. State*, 693 P.2d 855, 858 (Alaska 1985) (determining that general public means vessels and others who may want to use the dock facilities).

154. Shell, *supra* note 142, at 452-62.

155. *United Paperworkers*, 484 U.S. at 44; *see also* Shell, *supra* note 142, at 458-62.

156. Shell, *supra* note 142, at 480.

157. *Id.* at 452.

158. *Id.* at 506-09.

public policy must be met before such invalidation can be countenanced. As a result, the standard that has been derived in the previous analysis of invalidation of waivers of statutory privileges must be supplemented with this authority. Therefore, it needs to be recognized that not only must a strong public policy for the benefit of the general public be found to invalidate a waiver of bankruptcy privileges but also the underlying policy must be based on existing law and precedent. In addition, the underlying policy must be a "well defined and dominant public policy against contract enforcement" and be literally compelled by the statute.

Thus, a refined version of the standard that must be met to support public policy invalidation of a waiver of bankruptcy privileges is as follows:

1. There must be a strong, well defined and dominant policy against enforcement of the waiver expressed in existing law and precedent;
2. The policy must be one designed for the benefit of the general public; and,
3. The policy of not enforcing the waiver must be one literally compelled by the language of the statute.

With this standard in mind, we will analyze whether waivers of bankruptcy privileges should be enforced.

### III. APPLICATION OF THE LAW OF WAIVER TO BANKRUPTCY PRIVILEGES

Case law that has developed in the area of waiver of bankruptcy privileges does not discuss the issue as a question of contractual waiver of statutory privileges. There is no discussion of the general standards for waiver of such statutory privileges. In addition, there is no consideration of the waiver of statutory privileges in other areas of the law. Instead, the question is controlled by the mythology surrounding waiver of bankruptcy privileges that has been previously discussed.<sup>159</sup> Part of this mythology is the jettisoning of both discussion and application of the general rules of law that relate to waiver of statutory privileges. In the bankruptcy arena, the general law of waiver is walled off and ignored, and the issue is treated as though there is something unique about bankruptcy in this regard.

However, there is no basis for such treatment of the law of bankruptcy.<sup>160</sup> Indeed, given the fact that bankruptcy is statutory law and is not a fundamental liberty in our system, it is surprising to find that fundamental constitutional liberties can be waived more easily than privileges in bankruptcy. One can waive the privilege against self-incrimination after being placed under psychological pressure, can be deceived out of their right not to be subjected to unreasonable searches and seizures, and can waive many important statutory privileges. However, one cannot waive one's ability to file bankruptcy or to get a discharge or, in many jurisdictions, to have the benefit of an automatic stay. This situation is peculiar and is a result of the mythology and historical curiosities described

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159. *See supra* Part II.B.1-6.

160. *See supra* Part II.B.1-6.

above.<sup>161</sup>

So how should one look at waivers of bankruptcy privileges? Such waivers should be viewed simply as contractual waivers of statutory privileges that are subject to the same rules as are applicable to all other statutory privileges. Thus, the rules regarding waivers of other statutory privileges can be applied to waiver of bankruptcy privileges.

This does not, of course, mean that the result of whether bankruptcy privileges may be waived is foreordained to come out in a particular way. Some bankruptcy privileges may be subject to waiver and others not. The main point here is to lay aside the mythology surrounding the waiver of bankruptcy privileges. This is not a special bankruptcy issue. It is just another issue of waiver of statutory privileges.

#### *A. Waiver of Other Statutory Privileges*

Before attempting to apply the general standard for waiver of bankruptcy privileges, one might, from reviewing contexts in which statutory privileges have been permitted to be waived and those where waiver has not been allowed, be able to construct an argument that debtor-creditor law, and the law of bankruptcy generally, is simply not the sort of area of law where waiver of statutory privileges has been allowed. A review of the circumstances where waiver has been allowed is, then, appropriate.

Note that, as has been mentioned before, the area of the relation of employer and employee is one where waiver of employee statutory privileges has been viewed with great suspicion and only rarely permitted. For example, employee rights to damages for negligent injury, to annuity and pension benefits, and to regulated hours of work have been held to be statutory privileges not subject to waiver.<sup>162</sup> Similarly, workers have been held to be unable to waive rights given under collective bargaining contracts.<sup>163</sup> A worker may not waive the right to workers' compensation by assigning the rights to compensation to a third person.<sup>164</sup> Waiver of rights to the minimum wage is not permitted.<sup>165</sup> Also, a person cannot waive rights to unemployment compensation.<sup>166</sup> It has been held that a union cannot waive the statutory rights of employees to their usual pay while voting.<sup>167</sup> The statutory right to have a union represent an employee in a grievance procedure may not be waived in a collective bargaining agreement.<sup>168</sup>

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161. *See supra* Part II.C.

162. 28 AM. JUR. 2D *Estoppel and Waiver* § 165 (1966).

163. CORBIN ON CONTRACTS, *supra* note 148, at 731.

164. *Egy v. United States Fidelity & Guarantee Co.*, 651 P.2d 954, 958 (Kan. Ct. App. 1982).

165. *Sherba Bros., Inc. v. Campbell*, 361 So. 2d 814, 815 (Fla. Dist. Ct. App. 1978).

166. *Southwestern Bell v. Employment Sec. Review Bd.*, 502 P.2d 645, 653 (Kan. 1972).

167. *Benane v. International Harvester Co.*, 142 Cal. App. 2d Supp. 874, 880 (Cal. App. Dep't Super. Ct. 1956).

168. *Red Bank Reg'l Educ. Ass'n v. Red Bank Reg'l High Sch. Bd. of Educ.*, 398 A.2d 267 (N.J. 1978).

In employer-employee relations, there are many statutory privileges that cannot be waived. This is undoubtedly due to the strong public interest in protecting the health, safety and well-being of workers.

On the other hand, in the area of regulation of property rights, it is generally accepted that statutory privileges may be waived; there is not a sufficient general public interest in these issues to invalidate waivers. It has been held that a person's statutory rights to consequential damages may be waived.<sup>169</sup> Statutorily mandated drainage rights on real property also have been held subject to waiver.<sup>170</sup> Further, the liability of one party to another for negligence may be limited, thereby constituting a waiver of rights to damages.<sup>171</sup> While most statutory property related rights may be waived, not all property rights may be waived. For instance, the right to appraisal before foreclosure may not be subject to waiver.<sup>172</sup>

In evidentiary, procedural and fundamental liberty areas, one finds that rights and privileges may generally be waived. We have already seen that constitutional privileges can be waived quite easily.<sup>173</sup> Statutory social worker-patient privileges may be waived under certain circumstances.<sup>174</sup> Even what appear to be some of the most protected statutory rights, such as the rights provided under civil rights legislation, can be waived.<sup>175</sup> Although it is often held that protections given by statutes of limitations cannot be waived, there are at least some circumstances where rights under these statutes may be waived. The court in *Fireman's Fund Insurance v. Sand Lake Lounge, Inc.*<sup>176</sup> recognized that, as a general rule, a promise to waive the benefit of a statute of limitation or an agreement not to use it as a defense is against public policy if made at the time of contracting.<sup>177</sup> However, the court noted Corbin's statement that while parties cannot extend the statute of limitations, they can shorten it if the time period and circumstances surrounding the making of this promise are reasonable.<sup>178</sup> Therefore, according to the opinion in *Fireman's Fund*, the court needs to look at the reasonableness of the provision at the "inception of the loss" to determine

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169. *Canal Elec. Co. v. Westinghouse Elec. Corp.*, 548 N.E.2d 182, 184 (Mass. 1990).

170. *Halsrud v. Brodale*, 72 N.W.2d 94, 99 (Iowa 1955).

171. *See Lee v. Sun Valley Co.*, 625 P.2d 361 (Idaho 1984) (enforcing waiver of rights against stable renting horses).

172. Susan E. Drake, *Debtor's Contractual Waiver of Appraisal Rights Held Invalid*, 47 S.C. L. REV. 37 (1995).

173. *See supra* Part III.A.

174. *Community Serv. Soc'y v. Welfare Inspector Gen.*, 398 N.Y.S.2d 92, 95 (N.Y. Sup. Ct. 1977) (noting that any waiver of privilege in the social worker-patient relationship must involve the "clear relinquishment of a known right").

175. *Town of Newton v. Rumery*, 480 U.S. 386 (1987) (upholding contractual waiver of rights under 42 U.S.C. § 1983); *Evans v. Jeff D.*, 475 U.S. 717 (1986) (enforcing contractual waiver of right to attorney's fees under 42 U.S.C. § 1988); *see also* Shell, *supra* note 142, at 480-82.

176. 514 P.2d 223 (Alaska 1973).

177. *Id.* at 226.

178. *Id.* at 226; *see also* 1A CORBIN ON CONTRACTS § 218 (1963).

if it was reasonable in the contract in question.<sup>179</sup> In *Fireman's Fund*, the court performed this analysis and found the shortened time period was unreasonable because of the uneven bargaining power in the transaction that relegated one party to a "take-it-or-leave-it" position.<sup>180</sup> Thus, as is typical, the bargaining power of the parties played a role in the enforceability of the contract provision.

In the area of debtor-creditor law a number of cases disallow waiver of rights and privileges given to debtors. In these types of cases, some of the best arguments against enforcement of waiver of bankruptcy privileges can be made as a matter of contract law. Debtors have been denied permission to waive the privileges of discharge, usury law, and exemptions.<sup>181</sup> That exemptions cannot be contractually waived is generally accepted.<sup>182</sup> It has also been held that rights to redemption in connection with foreclosure may not be waived.<sup>183</sup> While mechanics' liens have been held to be waivable, it has been held that the ability to waive rights to see records relating to construction work may not be waived.<sup>184</sup>

There are, nonetheless, debtor-creditor related laws that can be waived. There is authority that usury defenses can be waived in some circumstances.<sup>185</sup> As noted previously, mechanics liens may be waived.<sup>186</sup> The right of setoff provided in a statute also may be waived.<sup>187</sup> As described earlier, at least in a federal receivership, the right to file bankruptcy itself may be limited.<sup>188</sup>

While the law relating to waiver of rights in the debtor-creditor area contains inconsistencies, there does seem to be a reluctance to allow waiver of a debtor's statutory rights. This may be a result of the same historical background that has led to the mythology relating to waiver of bankruptcy privileges.

It is very difficult to sustain the waiver of privileges under health and welfare statutes, as evidenced by the labor cases. This fits well with the standard earlier proposed for when waivers of statutory privileges are appropriate. First, the necessity for a strong public policy is met in laws to protect the safety or general well being of workers. Second, the statute must be for the benefit of the general public, which is the case in labor and related laws. Third, the underlying policies for protection of the general public are typically contained in the literal directives of the statute. Laws directed at the safety and welfare of workers are specifically and explicitly made for the benefit of the general public—that is, those who

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179. *Fireman's Fund*, 514 P.2d at 226.

180. *Id.* at 227.

181. CORBIN ON CONTRACTS, *supra* note 148, at 731-32.

182. See, e.g., *Industrial Loan & Inv. Co. v. Superior Ct.*, 209 P. 360 (Cal. 1922); *Iowa Mut. Ins. Co. v. Parr*, 370 P.2d 400 (Kan. 1962).

183. *Elson Dev. Co. v. Arizona Sav. & Loan Ass'n*, 407 P.2d 930 (Ariz. 1965).

184. *Allerton Constr. Corp. v. Fairway Apartments Corp.*, 267 N.Y.S.2d 860 (N.Y. Sup. Ct. 1966).

185. *Dunbabin v. Brandenfels*, 566 P.2d 941 (Wash. Ct. App. 1977) (finding that a settlement agreement waiving usury defense is enforceable).

186. *Allerton*, 267 N.Y.S.2d at 861.

187. *Wellens v. Beck*, 103 N.W.2d 281 (N.D. 1960).

188. *United States v. Royal Business Funds Corp.*, 724 F.2d 12, 15-16 (2nd Cir. 1983).

participate in the economic world in one way or another. Thus, the language of such statutes militates against waiver.

On the other hand, property rights are more easily waived. This may be a product of either less powerful public policy interests or the fact that laws relating to property interests are directed at something less than the general public—those that own particular types of property.

In the area of evidentiary, procedural, and liberty-related laws, there is considerable leeway given in allowing waivers of rights. This is, in some cases, due to generally less forceful policy interests underlying the laws and in others, by the typical rules relating to waiver of constitutional liberty interests.<sup>189</sup>

In the area of debtor-creditor relations the results are mixed. We find cases going in different directions on differing sorts of debtor-creditor laws. In this domain then it may be accurate to say that waivers of different sorts of privileges are closely and individually scrutinized; generalizations cannot be made on the strength or application to the general public of the policies underlying such differing privileges. The cases dealing with waivers relating to property interests support allowing waivers in the debtor-creditor area. Thus, simply looking at the category of debtor-creditor laws and the results of cases in this area does not resolve the issue of whether bankruptcy privileges may be waived. Moreover, the results in debtor-creditor cases may be an artifact of the same history and mythology that we have seen applied to bankruptcy waivers. To resolve the issue presented, it seems necessary to apply the general standard for waiver of statutory privileges previously described to bankruptcy waivers.<sup>190</sup>

### *B. Application of the Statutory Waiver Standard to Waiver of Bankruptcy Privileges*

To properly determine if waivers of statutory bankruptcy privileges are permitted as a matter of contract law, the three prongs of the standard discussed previously must be applied.<sup>191</sup> It is necessary first to determine if there is, in existing law and precedent, a strong, well defined and dominant public policy behind the statute militating against waiver. Second, it is necessary to ascertain whether, assuming there is a strong policy behind the law, this policy is directed at the general public. Third, the policy invalidating waiver must be literally compelled by the statute.

1. *The Strength of the Public Policy.*—The case law asserting that bankruptcy privileges may not be waived or may be waived only in extraordinary circumstances generally relies on the idea that such waivers violate public policy. Under the proposed three prong standard and Supreme Court precedent, any policy said to support invalidation of a contractual provision must be contained in existing law and precedent.<sup>192</sup> The existing law and precedent in this area are

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189. *See supra* Part III.A.

190. *See supra* Part III.B.

191. *See supra* Part II.B.2.

192. *United Paperworkers*, 484 U.S. at 43; *see also supra* Part II.B.2.

relatively sparse and are generally found in cases at the bankruptcy court level. The Supreme Court has not dealt with this issue. There is some legislative history that supports the stated policies, but there is also legislative history that supports countervailing policies.<sup>193</sup> To say that “existing law and precedent” establishes the policies argued to preclude waivers of bankruptcy privileges is a weak and suspect statement.

Moreover, as has been established,<sup>194</sup> the policies that are said to weigh against waiver of bankruptcy privileges are either fallacious, much more weak and restricted than appears at first blush, or are pitted against strong policies supporting such waivers. This is not the kind of “well defined and dominant” policy argument necessary to support a prohibition on waivers. In these circumstances, it is not arguable that existing law and precedent demonstrates a “well defined and dominant policy against contract enforcement.”<sup>195</sup> Given the opposing policies and conflicting precedent, and the Supreme Court’s restrictive stand on when private agreements can be found unenforceable due to public policy concerns, there is insufficient policy horsepower to overcome contractual waivers on policy grounds.

2. *The Focus of the Policies.*—Even if we assume that the policies against enforcement of waivers of bankruptcy privileges meet the first prong of the test for contractual waiver of statutory privileges, there is difficulty in finding that the second prong is met. Are the privileges of filing bankruptcy, and making use of the automatic stay and the discharge meant to protect the “general public?” As we have seen, what is typically meant by the “general public” is all of the public. In a sense, one may consider bankruptcy law to be a law to protect the interests of the general public. It aids most any person in financial difficulty. However, the bankruptcy law surely does not have this broad sense in the same way that health and safety laws do. The bankruptcy laws are directed at a smaller group than the group of all persons involved in the economy as workers, producers, or consumers.

One can forcefully argue, in fact, that the bankruptcy law is not directed at the general public but at a very limited group—the class of debtors and their creditors and, even more specifically, the class of debtors in financial difficulty and their creditors. This is not the “general public;” it is not the public as a whole. When looking at more specific provisions of the Code, like the discharge provisions, it becomes even more apparent that the focus of these provisions is not the whole of the general public. The discharge provisions are aimed at only a part of the debtor class—those individuals who have not engaged in certain illegal or immoral activities and corporations successfully reorganizing.<sup>196</sup> Many portions of the automatic stay have the same kind of more limited characteristics. For example, all of the stay provisions relating to enforcement of liens apply only to the classes of debtors and creditors owing or owning secured debt.

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193. See *supra* Part II.B.2.

194. See *supra* Part II.B.2.

195. *United Paperworkers*, 484 U.S. at 43.

196. See 11 U.S.C. § 524, 1141 (1994).

Recall also that waivers of property-related laws are not closely scrutinized and typically are enforced.<sup>197</sup> This may be due to the fact that property-related laws often are focused on subsets of the public. Bankruptcy law may be viewed similarly.

The bankruptcy law is not directed at the “general public.” It is aimed at a smaller group. Specific provisions, like those related to the discharge and automatic stay of lien enforcement that are benefits of bankruptcy that are sometimes waived, are aimed at even smaller subsets of entities. None of the even more restricted notions of the “general public” would seem to apply to these small segments of the public. These restricted “general public” cases appear to involve either the vast majority of the public or all persons engaging in a certain activity or commerce.<sup>198</sup> The bankruptcy law is aimed at more circumscribed groups—failing debtors and their creditors, not all persons engaging in an activity or commerce.

The conclusion on this issue is not crystalline. Certain debtor-creditor law waiver cases, like the cases stating that exemptions may not be waived, imply that the general public standard is met in the case of the bankruptcy law. On the other hand, these results may be an artifact of the courts in these cases actually applying a standard more hostile to waivers than the one proposed here and supported by contract law authority. As we have seen, the application of such hostile standards may be a result of historical concerns about debtor-creditor relations that arose out of the Great Depression. There is no doubt, however, that a strong argument can be made that the bankruptcy law is not one directed at the general public but a law directed at a certain subgroup of the larger class of debtors and, sometimes, creditors.

3. *Literal Compulsion of Invalidity of Waivers.*—The Supreme Court’s view of invalidation of contract provisions based on public policy requires for invalidation that such invalidation be compelled by the language of the statute. From our review of relevant provisions of the statute, however, there is nothing in the language of the statute that compels invalidation of waivers of bankruptcy privileges.<sup>199</sup> Provisions commonly argued to be of significance here generally are not and any provisions that do have significance have this significance in only very narrow circumstances.<sup>200</sup>

Therefore, regardless of one’s conclusion on the first and second prongs of the waiver invalidation test, this third prong appears to destroy any possibility of prohibition of such waivers. Note that the result here applies equally to all waivers of bankruptcy privileges. The same logic applies to waiver of the ability to file bankruptcy, waiver of the stay, waiver of discharge and waiver of other provisions of the Bankruptcy Code not specifically precluded by statutory language.

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197. See *supra* note 172 and accompanying text.

198. See *supra* notes 152-53 and accompanying text.

199. See *supra* notes 31-45 and accompanying text.

200. See *supra* notes 18-19 and accompanying text.

### *C. Contractual Limitations on Waivers of Bankruptcy Privileges*

Concluding that bankruptcy privileges may be waived when looked at from the perspective of the law of contractual waiver cannot end our analysis. There are other doctrines of contract law that may limit such waivers.

Foremost among these limitations is the doctrine of unconscionability. It has been said that this doctrine requires both procedural unconscionability (a problem relating to the way the contract was created) and substantive unconscionability (an oppressive provision in the contract).<sup>201</sup> However viewed, this doctrine focuses primarily on discrepancies in bargaining power of the parties.<sup>202</sup> Where there is a major difference in the bargaining power of the parties that results in a surprising or oppressive provision, the court may refuse to enforce or limit application of the provision.<sup>203</sup> With this focus on bargaining power, it is not shocking that the doctrine of unconscionability is most frequently found in cases of consumers and only rarely in commercial cases.<sup>204</sup> The doctrine has frequently been used to invalidate or limit waiver provisions in contracts.<sup>205</sup> Therefore, where a waiver is found to be oppressive and burdensome and is a result of unequal bargaining power, courts may refuse to enforce a waiver of bankruptcy privileges.

Similarly, there is reluctance in the courts to enforce certain sorts of boilerplate non-negotiated agreements.<sup>206</sup> Adhesion contracts of this kind are not enforced when the party with superior bargaining power offers a form contract on a take-it-or-leave-it basis, and the subject matter of the contract is one of necessity, not reasonably available elsewhere.<sup>207</sup> It has been forcefully argued that the modern reality of contracts is such that a contract should be enforced only to the extent of terms that have been actually bargained over, plus any other reasonable terms contained in the contract.<sup>208</sup> Such an approach would also be useful in avoiding the enforcement of waivers of bankruptcy privileges where a

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201. Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 488 (1967); *see also* Arkwright Boston Mfrs. Mut. Ins. Co. v. Westinghouse Elec. Corp., 844 F.2d 1174 (5th Cir. 1988).

202. *Hydraform Prods. Corp. v. American Steel & Aluminum Corp.*, 498 A.2d 339 (N.H. 1985); *see also* U.C.C. § 2-302, Cmt. 1.

203. *Hydraform*, 498 A.2d at 343 (citing *Cryogenic Equip., Inc. v. Southern Nitrogen, Inc.*, 490 F.2d 696, 699 (8th Cir. 1974)).

204. HOWARD O. HUNTER, *MODERN LAW OF CONTRACTS* (1976); *see also* *Consolidated Data Terminals v. Applied Digital Data Sys., Inc.*, 708 F.2d 385 (9th Cir. 1983); *Earman Oil Co. v. Burroughs Corp.*, 625 F.2d 1291 (5th Cir. 1980).

205. E. ALLAN FARNSWORTH, *CONTRACTS* 326-27 (2d ed. 1990). *See generally* U.C.C. § 2-302 (1995); *RESTATEMENT (SECOND) OF CONTRACTS* § 208 (1979).

206. FARNSWORTH, *supra* note 205, at 313-14 & n.16; *see also* *John Deere Leasing Co. v. Blubaugh*, 636 F. Supp. 1569 (D. Kan. 1986).

207. Robert A. Hillman, *Debunking Some Myths About Unconscionability: A New Framework For U.C.C. Section 2-302*, 67 CORNELL L. REV. 1, 9 (1981).

208. HUNTER, *supra* note 204, at 19:60-61.

party is unaware of the waiver or it is not a result of true bargaining and negotiation.

Thus, there are a number of contract law doctrines that may limit enforceability of waivers of bankruptcy privileges. These doctrines should be applied liberally to waivers of bankruptcy privileges so that only truly bargained for waivers of which parties are aware are enforced.

### CONCLUSION

Contractual waivers of bankruptcy privileges are nothing more than waivers of statutory privileges. Whether such waivers can be enforced is a matter of contract law. The law of contract allows the waiver of statutory rights and privileges so long as the statute does not compel invalidation of the clause based on a strong, well defined, and dominant public policy in existing law and precedent enacted for the benefit of the general public. The case law in bankruptcy relating to this issue does not, however, speak in the terms of the law of contractual waivers of statutory privileges.

Instead, the bankruptcy case law speaks its own language. It does not treat the issue as one of contract law but rather as another special issue of bankruptcy law. In this connection a mythology has arisen surrounding waivers of bankruptcy privileges. This mythology, which is composed of some utter falsities and a number of half-truths, has been used to sustain a theory that bankruptcy privileges are special creatures not subject to ordinary rules concerning waiver of statutory privileges. It is this mythology that has led to the generally accepted idea that bankruptcy privileges may not be waived. The elements of this mythology are, however, unsupportable. The issue of waiver of bankruptcy privileges is just another contract question that should be answered under contract principles. A major point of this Article is to expose the mythology of the law in this area.

Whether to enforce a waiver of a bankruptcy privilege should be determined under the contract law standard for the enforcement of such waivers. The formulation of the standard settled upon here is that, for a waiver of a statutory privilege to be unenforceable, one must show that there is in existing law and precedent a strong, well defined and dominant public policy for the benefit of the general public supporting the privilege sought to be waived. Moreover, one must demonstrate that invalidation of this waiver is compelled by the language of the statute. Under this standard it has been shown that there is no strong public policy of the kind necessary to prevent the waiver of any bankruptcy privileges, including the ability to file bankruptcy itself. Moreover, even if there were a strong policy in favor of not allowing waivers, it can be potently argued that the bankruptcy law is not intended for the benefit of the general public. Further, the language of the statute does not compel a particular conclusion on this issue. As a result, contractual waivers of bankruptcy privileges should, as a general proposition, be enforced.

This is not to say that all waivers of bankruptcy privileges should be enforced. The limitations on enforcement of onerous contract provisions imposed by contract law, like the unconscionability doctrine and law relating to

adhesion contracts, must be honored. In this way, only bargained for waivers should be enforced. As a result, it might well be found that such waivers are generally unenforceable in consumer contracts. This result, however, requires case law development.

Thus, with the mythology burst, waivers of bankruptcy privileges should be viewed as contract questions and such waivers should be permitted in circumstances where waivers of other statutory privileges are permitted.



# REEVALUATING SUBSTANTIVE DUE PROCESS AS A SOURCE OF PROTECTION FOR PSYCHIATRIC PATIENTS TO REFUSE DRUGS

WILLIAM M. BROOKS\*

My medical regimen during my hospital stays usually didn't consist of much more than doses of drugs—usually Thorazine. When I took the prescribed amount, I was usually out of Bellevue in three or four days. But I hated the effect of the drug. It was like putting my head in a vise; it cut off the free flow of ideas; it stifled imagination; it literally killed inspiration.<sup>1</sup>

## INTRODUCTION

The right of psychiatrically hospitalized patients to refuse drugs has been characterized as arguably the most important subject in the area of mental health law.<sup>2</sup> Thus, it is hardly surprising that this issue has generated much controversy and heated discussion.<sup>3</sup> Every state takes action to involuntarily hospitalize mentally ill individuals deemed dangerous to self or others and numerous states

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1. Richard Kopperdahl, *Bettervue Hospital*, THE VILLAGE VOICE, Oct. 3, 1995, at 33.

2. Michael L. Perlin, *Reading the Supreme Court's Tea Leaves: Predicting the Judicial Behavior in Civil and Criminal Right to Refuse Treatment Cases*, 12 AM. J. FORENSIC PSYCHIATRY 37, 40 (1991).

3. See Dennis E. Cichon, *The Right to "Just Say No": A History and Analysis of the Right to Refuse Antipsychotic Drugs*, 53 LA. L. REV. 283, 286 (1992) (commenting that shortly after the filing of the initial right to refuse cases, “[t]he right to refuse antipsychotic drugs soon became the most controversial and divisive issue between the medical and legal professions”); Franklin J. Hickman et al., *Right to Refuse Psychotropic Medication: An Interdisciplinary Proposal*, 6 MENTAL DISABILITY L. REP. 122, 122 (1982). See also Catherine E. Blackburn, *The "Therapeutic Orgy" "and the 'Right to Rot'" Collide: The Right to Refuse Antipsychotic Drugs Under State Law*, 27 HOUS. L. REV. 447, 447 (1990) (discussing the heated controversy over the right to refuse drugs). Professor Blackburn highlighted the emotional tenor of this dispute in the title of her article by incorporating two of the more pejorative descriptions of the impact of antipsychotic medication and the consequences of permitting patients to refuse such treatment. These pejorative descriptions came from two sources: (1) a lawyer characterized institutional psychiatrists as subjecting patients to an “orgy” of drug treatment, Robert Plotkin, *Limiting the Therapeutic Orgy: Mental Patients' Right to Refuse Treatment*, 72 NW. U. L. REV. 461, 461 (1978); and (2) shortly thereafter, two leading psychiatrists maintained that granting patients the right to refuse medication provided them with the opportunity to “rot with their rights on,” Paul S. Appelbaum & Thomas G. Gutheil, *“Rotting With Their Rights On”: Constitutional Theory and Clinical Reality in Drug Refusal by Psychiatric Patients*, 7 AM. ACAD. PSYCHIATRY & L. 306, 306-07 (1979) [hereinafter “*Rotting With Their Rights On*”].

grant such authority to persons in the medical profession.<sup>4</sup> Indeed, seventeen states authorize confinement for the express purpose of providing treatment to mentally ill patients.<sup>5</sup> Under these circumstances, numerous psychiatrists have questioned and assailed the propriety of permitting a psychiatric patient who theoretically fails to understand the need for treatment to refuse the very medication a psychiatrist has prescribed to treat the patient's mental illness.<sup>6</sup> The psychiatric profession has accused the legal system of failing to take into account "clinical realities" when it broadly defines the right to refuse medication.<sup>7</sup> The psychiatric profession further believes that the right of patients to refuse medication destroys physicians' ability to manage patients, disrupts ward milieu, and exacerbates the refuser's illness.<sup>8</sup>

In contrast, both the legal and medical professions recognize that psychotropic medication in general, and antipsychotic medication in particular,<sup>9</sup> often produce side effects ranging in nature from short-term and merely discomforting to permanent and life-threatening.<sup>10</sup> Furthermore, the common law has long recognized that competent adults may determine their own course of treatment.<sup>11</sup> In addition, virtually every state provides that notwithstanding involuntary commitment, patients remain competent as a matter of law absent a specific finding to the contrary.<sup>12</sup> Thus, it is not surprising that mental patients, their lawyers and legal scholars have challenged any unbridled authority to administer medication in the best interests of the patient without consent.<sup>13</sup> Such challenges are particularly understandable when one recognizes that institutional considerations and not the well-being of patients may motivate the treatment

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4. See SAMUEL J. BRAKEL ET AL., THE MENTALLY DISABLED AND THE LAW 101-09, 159-60 (1985).

5. *Id.* at 114, 159-60. Indeed, as the Constitution prohibits the commitment of any individual who does not suffer from mental illness, *Foucha v. Louisiana*, 504 U.S. 71, 77-78 (1992), the commitment of everyone, at least implicitly, involves the provision of treatment.

6. See, e.g., Paul S. Appelbaum, *The Right to Refuse Treatment With Antipsychotic Medications: Retrospect and Prospect*, 145 AM. J. PSYCHIATRY 413, 417 (1988); Harold I. Schwartz et al., *Autonomy and the Right to Refuse Treatment: Patients' Attitudes After Involuntary Medication*, 39 HOSP. & COMMUNITY PSYCHIATRY 1049, 1049 (1988).

7. See, e.g., Paul S. Appelbaum & Thomas G. Gutheil, *Drug Refusal: A Study of Psychiatric Inpatients*, 137 AM. J. PSYCHIATRY 340, 345 (1980); "Rotting With Their Rights On", *supra* note 3, at 315; Schwartz et al., *supra* note 6, at 1049.

8. Blackburn, *supra* note 3, at 485.

9. See *infra* notes 55-57 and accompanying text for a discussion of the difference between psychotropic and antipsychotic medication.

10. See *infra* notes 76-126 and accompanying text.

11. See, e.g., *Schloendorff v. Society of N.Y. Hospital*, 211 N.Y. 125 (1917), *Pratt v. Davis*, 118 Ill. App. 161, 166 (1905); *Natanson v. Kline*, 350 P.2d 1093 (Kan. 1960). See generally Note, *A Common Law Remedy for Forcible Medication of the Institutionalized Mentally Ill*, 82 COLUM. L. REV. 1720, 1736 (1982) [hereinafter *Common Law Remedy*].

12. See *infra* note 507 and accompanying text.

13. See generally Cichon, *supra* note 3.

decisions of psychiatrists.<sup>14</sup>

Litigation over the right to refuse medication began in a New Jersey court with an anonymous patient.<sup>15</sup> Challenges commenced in earnest a few years later with the filing of two class action lawsuits in United States district courts: *Rogers v. Okin*<sup>16</sup> and *Rennie v. Klein*.<sup>17</sup> However, the willingness of federal courts to provide protection to patients who sought to refuse medication abruptly halted after 1980 when the Supreme Court remanded one of these cases, *Rennie v. Klein*,<sup>18</sup> in light of its decision in *Youngberg v. Romeo*,<sup>19</sup> a case that addressed the issue of a mentally retarded person's right to treatment, not the right to refuse treatment. In *Youngberg*, the Supreme Court held that treatment decisions by professionals in an institution for individuals with mental retardation are presumptively valid and such decisions will not violate an individual's right to treatment unless they constitute "a substantial departure from accepted professional judgment, practice or standards."<sup>20</sup> As a result, between 1980 and 1990, federal courts that addressed the issue of the right of civilly committed patients to refuse medication invariably applied the *Youngberg* professional judgment standard. Those courts held that patients could not refuse medication unless the decision to administer drugs constituted a substantial departure from accepted judgment, practice or standards.<sup>21</sup>

However, during the same time period, many state courts issued decisions broadly defining the right to refuse drugs.<sup>22</sup> State court decisions such as *Rivers*

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14. See Susan Stefan, *Leaving Civil Rights to the "Experts": From Deference to Abdication Under the Professional Judgment Standard*, 102 YALE L.J. 639, 665 (1992).

15. *In re B.*, 383 A.2d 760 (N.J. Super. Ct. Law Div. 1977).

16. 478 F. Supp. 1342 (D. Mass. 1979) [hereinafter Rogers I], *aff'd in part, rev'd in part*, 634 F.2d 650 (1st Cir. 1980) [hereinafter Rogers II], *vacated sub nom.*, Mills v. Rogers, 457 U.S. 291 (1982) [hereinafter Rogers III], *opinion on remand sub nom.*, Rogers v. Okin 738 F.2d 1 (1st Cir. 1984) [hereinafter Rogers IV].

17. 476 F. Supp. 1294 (D.N.J. 1979) [hereinafter Rennie II], *stay granted by* 481 F. Supp. 552 (D.N.J. 1979), *vacated en banc*, 653 F.2d 836 (3d Cir. 1981) [hereinafter Rennie III], *vacated and remanded*, 458 U.S. 1119 (1982) [hereinafter Rennie IV], *opinion on remand*, 720 F.2d 266 (3d Cir. 1983) (en banc) [hereinafter Rennie V].

18. *Rennie IV*, 458 U.S. at 1119.

19. 457 U.S. 307 (1982).

20. *Id.* at 323.

21. See, e.g., *Dautremont v. Broadlawns Hosp.*, 827 F.2d 291, 300 (8th Cir. 1987); *Johnson v. Silvers*, 742 F.2d 823, 825 (4th Cir. 1984); *Project Release v. Prevost*, 722 F.2d 960, 980-81 (2d Cir. 1983); *Rennie V*, 720 F.2d at 269-79; *R.A.J. v. Miller*, 590 F. Supp. 1319, 1321-22 (N.D. Tex. 1984).

22. See, e.g., *Anderson v. State*, 663 P.2d 570, 575 (Ariz. Ct. App. 1982); *Riese v. Saint Mary's Hosp. & Med. Ctr.*, 271 Cal. Rptr. 199, 208-09 (Cal. Ct. App. 1987); *People v. Medina*, 705 P.2d 961, 967-68 (Colo. 1985); *Goedecke v. Department of Insts.*, 603 P.2d 123, 125 (Colo. 1979) (per curium); *In re M.P.*, 510 N.E.2d 645, 646 (Ind. 1987); *Rogers v. Department of Mental Health*, 458 N.E.2d 308, 314 (Mass. 1983); *Jarvis. v. Levine*, 418 N.W.2d 139, 148 (Minn. 1988); *Opinion of the Justices*, 465 A.2d 484, 488-89 (N.H. 1983); *Rivers v. Katz*, 495 N.E.2d 337, 342-43 (N.Y.

v. *Katz*<sup>23</sup> and *Riese v. Saint Mary's Hospital*,<sup>24</sup> supporting the right of patients to refuse drugs contrasted with the willingness of federal courts to defer to clinical professionals' judgment in similar cases, led many authorities to dismiss federal courts as a forum for protecting individuals from forcible administration of medication. Accordingly, mentally ill individuals would have to turn to state courts as a source of protection.<sup>25</sup>

However, since 1990, the Supreme Court has addressed the right to refuse medication in two other contexts: when a psychiatric patient is in a prison setting,<sup>26</sup> and when a state seeks to forcibly administer medication to induce a criminal defendant's competency.<sup>27</sup> In each case, the Supreme Court issued opinions that clearly support a far broader reading of the right to refuse under the Federal Constitution than the professional judgment standard of *Youngberg*.<sup>28</sup> These decisions have led to a re-evaluation of whether the post-*Rennie IV* cases warranted rejection of the Federal Constitution as a source of protection for a patient's right to refuse drugs.<sup>29</sup>

Even prior to these recent Supreme Court decisions, the dismissal of the Federal Constitution as a source of the right to refuse drugs was troubling. Since the passage of the post-Civil War era legislation, including the Fourteenth Amendment, "the role of the Federal Government as a guarantor of basic federal rights against state power was clearly established."<sup>30</sup> As such, the Federal Constitution has historically served as a shield against intrusive governmental behavior and a sword to uphold individual liberty in many different contexts.<sup>31</sup>

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1986); *In re K.K.B.*, 609 P.2d 747, 749-50 (Okl. 1980); *State ex rel. Jones v. Gerhardstein*, 416 N.W.2d 883, 892-93 (Wisc. 1987).

23. *Rivers*, 495 N.E.2d at 337.

24. 271 Cal. Rptr. 199 (Cal. Ct. App. 1987).

25. Perlin, *supra* note 2, at 43; Ellen Wright Clayton, *From Rogers to Rivers: The Rights of the Mentally Ill to Refuse Medication*, 13 AM. J.L. & MED. 7, 9 (1987).

26. *Washington v. Harper*, 494 U.S. 210 (1990).

27. *Riggins v. Nevada*, 504 U.S. 127 (1992).

28. 457 U.S. 307 (1982). For a discussion of *Harper* and *Riggins*, see *infra* notes 195-212 and accompanying text.

29. See, e.g., MICHAEL L. PERLIN, 2 MENTAL DISABILITY LAW § 5.65A at 90 (Supp. 1996).

30. *Mitchum v. Foster*, 407 U.S. 225, 239 (1972) (citations omitted). As one federal court noted, "If federal courts have any overriding reason for being, it is a source of protection to any person who believes there is a serious violation of his or her federal constitutional rights—particularly by government officials. The institutionalized mentally disabled are especially prone to abuse unless they can turn to the federal courts for protection." *Society for Good Will to Retarded Children v. Cuomo*, 652 F. Supp. 515, 518 (E.D.N.Y. 1987) (citations omitted).

31. See, e.g., *Roe v. Wade*, 410 U.S. 113, 153 (right to abortion), *reh'g denied*, 410 U.S. 459 (1973); *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969) (right to travel); *Reynolds v. Sims*, 377 U.S. 533, 551 (right to vote), *reh'g denied*, 379 U.S. 870 (1964). Beyond the historical role of the federal courts, the Eleventh Amendment bars federal courts from enjoining state officials based upon state law. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 117 (1984). Hence, any attempts to invoke the protection of the federal courts must rely upon federal law.

Moreover, even in jurisdictions where state law affords significant protection against forced drugging, the existence of a broad right to refuse medication under the Federal Constitution has a number of practical consequences. First, for those patients who wish to seek damages for the unlawful administration of medication, the statute of limitations for a federal cause of action pursuant to 42 U.S.C. § 1983<sup>32</sup> may well be longer than the state statute of limitations for intentional torts.<sup>33</sup> Second, a party who prevails in a lawsuit pursuant to 42 U.S.C. § 1983 is entitled to attorney fees.<sup>34</sup> Common sense suggests that the threat of paying fees may well serve to induce recalcitrant government officials to settle disputes with patients that they might not otherwise settle in the absence of this statutory fee shifting provision. Furthermore, many individuals who have been forcibly and unlawfully drugged do not suffer any long-term, and perhaps, even short-term, physical harm.<sup>35</sup> Moreover, it is difficult to measure the loss of dignity that a patient suffers when hospital staff hold him down so that a nurse may inject medication. This absence of measurable harm limits the ability of patients to secure legal assistance on a contingency basis as it will be a rare member of the private bar who agrees to represent a patient on a contingency basis with only non-pecuniary interests at stake.<sup>36</sup> The availability of attorney

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32. 42 U.S.C. § 1983 (1994). Section 1983 creates causes of action for violations of rights under the Federal Constitution or federal statutes, but not state law. *See, e.g.*, *Baker v. McCollan*, 443 U.S. 137, 146-47 (1979).

33. A state's "general or residual limitations statute for personal injury actions" governs lawsuits filed pursuant to 42 U.S.C. § 1983. *Owens v. Okure*, 488 U.S. 235, 249-50 (1989). For example, in New York, the general limitations period is three years. *Id.* However, New York's limitations period for intentional torts, such as assault and battery, is one year. N.Y. CIV. PRAC. L. & RULES § 215 (McKinney 1990). *Compare James v. Sadler*, 909 F.2d 834, 836 (5th Cir. 1990) (three year limitations period in Mississippi for § 1983 actions), *with* MISS. CODE ANN. § 15-1-35 (West 1972) (one year limitations period for assault and battery); *Bauers v. City of Lincoln*, 514 N.W.2d 625, 634 (1994) (four year limitations period in Nebraska for § 1983 actions) *with* NEB. REV. STAT. § 25-208 (1996) (one year limitation period for assault and battery); *Gray v. Lacke*, 885 F.2d 399, 408-09 (7th Cir. 1989) (six year limitations period in Wisconsin for § 1983 actions) *with* WIS. STAT. ANN. § 893.57 (West 1996) (two-year limitations period for assault and battery). For an illustration of the various limitations periods for state causes of action that may also prompt a § 1983 lawsuit, see *Owens*, 488 U.S. at 244 n.8.

34. 42 U.S.C. § 1988 (1994).

35. See *infra* notes 78-92 and accompanying text for a discussion of temporary side effects that medication produces.

36. The Protection and Advocacy for Mentally Ill Individuals Amendments Act of 1991 authorizes federally funded advocacy programs to provide legal representation to institutionalized mentally ill individuals. 42 U.S.C. § 10805(a)(1)(C) (1994). However, Protection and Advocacy programs, as well as other government programs that provide legal services to civilly committed patients, have limited resources. *See Steven J. Schwartz et al., Protecting the Rights and Enhancing the Dignity of People with Mental Disabilities: Standards for Effective Legal Advocacy*, 14 RUTGERS L.J. 541, 550-53 (1983). Little question exists that Protection and Advocacy offices by themselves do not have the ability to address all the legal needs of institutionalized mentally ill

fees may well enhance a patient's ability to secure legal assistance.<sup>37</sup>

Finally, availability of a federal remedy may make it easier for a plaintiff or his attorney to obtain injunctive relief to prevent unlawful medication practices. The short-term nature of many psychiatric hospitalizations creates a substantial risk that claims involving unlawful medication practices will become moot before a court rules on the legality of the particular practice.<sup>38</sup> However, in the federal courts, certification of a class action will defeat any mootness claim as long as a legal controversy exists between any plaintiff class member and a defendant.<sup>39</sup> For this reason it may be advantageous for a plaintiff or his attorney to seek relief in federal court.<sup>40</sup>

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individuals.

37. A statement by a leading psychiatrist illustrates the need for an effective damages remedy: "No matter what the law does, we'll always [d]rug all the people we want. I hate to say that, but that's my experience. By hook or by crook, most of the patients will continue to be [drugged]." Cichon, *supra* note 3, at 387 (quoting Dr. Loren Roth in *Conference Report, Refusing Treatment in Mental Health Institutions: Values in Conflict*, 32 HOSP. & COMMUNITY PSYCHIATRY 255, 257 (1981)).

38. *See Goetz v. Crosson*, 728 F. Supp. 995, 1000-01 (S.D.N.Y. 1990) (recognizing transitory nature of claims of involuntarily hospitalized patients).

39. *See, e.g.*, *Sosna v. Iowa*, 419 U.S. 393, 402 (1975); *United States Parole Comm'n v. Geraghty*, 445 U.S. 399, 404 (1980).

40. For instance, generally, a court may certify a lawsuit as a class action only if a ripe claim exists at the time of certification. *Sosna*, 419 U.S. at 403. However, when a claim is of such transitory nature that it is not likely to remain ripe until class certification, federal courts will invoke the "relation-back" doctrine to certify the class. Criteria for the "relation-back" doctrine includes: (1) a ripe controversy existed when the named plaintiff filed the lawsuit; and (2) there is a "constant existence of a class of persons suffering the deprivation." *Gerstein v. Pugh*, 420 U.S. 103, 110-11 n.11 (1975).

Furthermore, federal courts may be more willing to certify class actions than some state courts. For example, in New York, the government operations rule holds that a court should not certify a lawsuit against a state agency because the doctrine of *stare decisis* will adequately protect similarly situated class members. *See, e.g.*, *Jones v. Berman*, 332 N.E.2d 303, 311 (N.Y. 1975) (citations omitted); *Martin v. Lavine*, 346 N.E.2d 794, 796 (N.Y. 1976) (citations omitted). Even if such premise is correct (and there is some question about whether it is, *see Daan Braverman, Class Certification in State Court Welfare Litigation: A Request for Procedural Justice*, 28 BUFFALO L. REV. 57, 79-81 (1979)), it fails to consider the role class actions play in maintaining justiciable controversies enabling courts to address claims that are short-lived in nature but impact upon many individuals. *See, e.g.*, *Alston v. Coughlin*, 109 F.R.D. 609, 612 (S.D.N.Y. 1976); *Mendoza v. Lavine*, 72 F.R.D. 520, 523 (S.D.N.Y. 1976).

In *Ruiz v. Acrish*, 89 Civ. 2935 (S.D.N.Y. October 25, 1989), the court certified a class of patients challenging a medication practice on the ground that certification eliminated the "very real possibility of the plaintiff's claims becoming moot prior to a determination on the merits." Slip. op. at 6. The lawsuit resulted in a state-wide settlement that eliminated the practice of physicians authorizing medication over objection on a PRN, i.e., as needed, basis for agitation even if a patient was not dangerous.

The right to refuse medication has two components.

'The substantive issue involves a definition of th[e] protected constitutional interest, as well as the identification of the conditions under which competing state interests might outweigh it. The procedural issue concerns the minimum procedures required by the Constitution for determining that the individual's liberty interest is actually outweighed in a particular instance.'<sup>41</sup>

This Article will address the scope of a civilly committed patient's right to refuse medication under the substantive component of the Due Process Clause. It will first examine how federal courts, including the Supreme Court, have addressed an individual's substantive right to refuse medication. This Article will then establish that even prior to *Harper* and *Riggins*, there was ample authority to support a broad right to refuse medication under the substantive component of the Due Process Clause of the Fourteenth Amendment. *Harper* is particularly significant because it reaffirms the notion that state law can, and will, define the scope of protections under the Federal Constitution.<sup>42</sup> This Article will then examine Supreme Court case pertaining to the scope of substantive protections accorded by the Due Process Clause and those cases' impact on the right to refuse. The analysis will include how the least restrictive alternative theory is appropriately applied in the refusal of treatment context.

An analysis of the Fourteenth Amendment right to refuse drugs requires an analysis of the textual source of this right and a determination of whether it is a fundamental right that would result in the greatest protection for patients. Regardless of whether the right to refuse is fundamental, this analysis also requires an examination of what state interests will override a patient's interest in refusing medication and what standard of review courts should apply when examining the government's efforts to override a patient's attempt to refuse drugs. It is also necessary to explore the interrelationship between right to refuse cases with other cases involving decisions to decline treatment such as the right to refuse civil commitment and the right to die. Those cases detail the balance of relevant state interests that a court must weigh against a patient's decision to refuse drugs. Finally, the Supreme Court's remand in *Rennie IV* must be reconciled with its remand of *Rogers III*.<sup>43</sup>

Finally, one must examine how the doctrine of state-created liberty interests impacts the right to refuse medication. Such an examination details that existing law in most states creates a broad right that the Federal Constitution protects. These considerations reveal that the right to refuse medication under the Fourteenth Amendment is far broader than has been recognized and affords patients the right to refuse except when they create an emergency within a hospital setting or are found to be incompetent to make decisions about the

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41. *Washington v. Harper*, 494 U.S. 210, 220 (quoting *Rogers III*, 457 U.S. at 299).

42. *Id.*

43. *Compare Rennie IV*, 458 U.S. at 1119, with *Rogers III*, 457 U.S. at 291.

administration of medication.<sup>44</sup>

### I. THE NATURE OF PSYCHOTROPIC MEDICATION<sup>45</sup>

In state-operated psychiatric hospitals, psychotropic drug treatment is the primary form of treatment.<sup>46</sup> In many mental health facilities, for all intents and purposes, medication is the only treatment patients receive.<sup>47</sup> It is estimated that up to three million people each year receive antipsychotic medication.<sup>48</sup>

The forcible administration of medication involves injecting medication into

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44. While ample authority supports the proposition that the Federal Constitution provides broader substantive protections to civil patients, one cannot say the same for the procedural component of the Due Process Clause. The Supreme Court has often recognized that the Constitution provides less procedural protections to individuals when interests other than one's physical liberty are at stake than when physical liberty itself is at risk. *See, e.g.*, *Lassiter v. Department of Social Servs.*, 452 U.S. 18, 26-27 (1981); *Scott v. Illinois*, 440 U.S. 367, 373 (1979). Second, the Supreme Court has shown a willingness to interpret the Fourteenth Amendment as requiring only informal professional review when liberty interests are at stake in psychiatric settings. *See Harper*, 494 U.S. at 231 (finding that in a prison setting "an inmate's interests are adequately protected, and perhaps better served, by allowing the decision to medicate to be made by medical professionals rather than a judge"); *Parham v. J.R.*, 442 U.S. 584, 613-17 (1979) (approving informal medical procedures for the admission of juveniles to psychiatric hospitals pursuant to a state statute authorizing the admission of minors upon the approval of their parents or guardians).

Indeed, the Supreme Court in *Rogers III* addressed in dicta the scope of procedural protections that accompany the right to refuse. Recognizing that judges and juries are not better qualified than appropriate medical professionals to make treatment decisions, the Court strongly suggested that because the State of Massachusetts evinced a judicial preference for resolution of patients' attempts to refuse medication, state law may afford greater procedural protection than did the Fourteenth Amendment. *Rogers IV*, 457 U.S. at 303-04. In contrast, while the Supreme Court has emphasized that courts should defer to professionals when clinical decisions must be made in individual situations, such deference to professional expertise is unnecessary when defining substantive rights such as privacy where there are no experts on such matters. *See Sheldon Gelman, The Biological Alteration Cases*, 36 WM. & MARY L. REV. 1203, 1246 (1995).

45. In addressing the nature of psychotropic medication, the author drew in part from a prior work. *See William M. Brooks, A Comparison of a Mentally Ill Individual's Right to Refuse Medication Under the United States and the New York State Constitutions*, 8 TOURO L. REV. 1 (1991).

46. Donald J. Kemna, *Current Status of Institutionalized Mental Health Patients' Right to Refuse Psychotropic Drugs*, 6 J. LEGAL MED. 107, 109 (1985); Dennis E. Cichon, *The Eighth Circuit and Professional Judgment: Retrenchment of the Constitutional Right to Refuse Medication*, 22 CREIGHTON L. REV. 889, 952 (1989).

47. Alexander D. Brooks, *The Right to Refuse Antipsychotic Medication: Law and Policy*, 39 RUTGERS L. REV. 339, 342 (1987).

48. Cichon, *supra* note 3, at 309.

one's body.<sup>49</sup> Psychotropic medication also produces numerous debilitating side effects, some of which may be permanent in nature.<sup>50</sup> No less an authority than the U.S. Supreme Court has recognized that the drugs psychiatric patients receive are "mind altering."<sup>51</sup> No one can seriously dispute that the injection of such an intrusive treatment regimen constitutes a significant infringement on bodily autonomy,<sup>52</sup> one of this Nation's most cherished rights under the Constitution,<sup>53</sup> which requires the most stringent due process protection that the Constitution provides.<sup>54</sup>

#### *A. Characteristics of Antipsychotic Drugs and Other Psychotropic Drugs*

Psychotropic drugs include all medications that affect one's mental processes.<sup>55</sup> They include antipsychotics, sedatives, tranquilizers, and hypnotics.<sup>56</sup> Antipsychotic drugs, also known as neuroleptics or major tranquilizers, aim to reduce symptoms of psychosis,<sup>57</sup> which is a mental disorder characterized by a loss of contact with reality.<sup>58</sup> Antipsychotic medication alters the chemical balance in an individual's brain, leading to changes in one's cognitive processes that are intended to be beneficial.<sup>59</sup> Although it is unknown exactly how this medication works, some medical professionals believe that the drugs impact upon the levels of dopamine that the brain produces.<sup>60</sup>

Antipsychotic medication does not cure mental illness.<sup>61</sup> Rather, antipsychotic drugs suppress psychotic symptoms such as hallucinations, delusions and paranoid ideation.<sup>62</sup> Furthermore, antipsychotic drugs will not

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49. Many, although not all, antipsychotic medications can be administered by injection. *See, e.g.*, PHYSICIAN'S DESK REFERENCE 510, 1585 (51 ed. 1997). The author previously worked for a patients' rights organization that represented patients at hearings to administer medication over objection pursuant to *Rivers v. Katz*, 495 N.E.2d 337 (N.Y. 1986), and has observed many medication hearings. Invariably, doctors will testify of the need to prescribe a drug that can be administered over objection because resort to injection is necessary if a patient refuses oral medication.

50. *See infra* notes 78-128 and accompanying text.

51. *Rogers III*, 457 U.S. 291, 293 n.1 (1982).

52. *See infra* notes 351-70 and accompanying text; *see also infra* note 376.

53. *See infra* notes 359-63 and accompanying text.

54. *See infra* notes 329 and 351-57 and accompanying text.

55. *See* Thomas G. Gutheil & Paul S. Appelbaum, "Mind Control," "Synthetic Sanity," "Artificial Competence," and *Genuine Confusion: Legally Relevant Effects of Antipsychotic Medication*, 12 HOFTSTRA L. REV. 77, 79 (1983) [hereinafter "Mind Control"].

56. *Id.*

57. *Id.*

58. WEBSTER'S MEDICAL DESK DICTIONARY 423 (1986).

59. *Harper*, 494 U.S. at 229.

60. *Cichon*, *supra* note 3, at 291 n.38.

61. *See* "Mind Control", *supra* note 55, at 101; *Kemna*, *supra* note 46, at 110.

62. *Kemna*, *supra* note 46, at 110.

alleviate many of the disabling aspects of schizophrenia, such as a lack of goal-directed behavior, profound asociality and absence of affectual drive.<sup>63</sup> These symptoms of schizophrenia are "more significant for prognosis and over-all outcome [than] the symptoms of schizophrenia that are amendable to a pharmacological approach."<sup>64</sup> Moreover, antipsychotic drugs will fail to benefit twenty per cent of the patients for whom the medication has been prescribed.<sup>65</sup> Physicians must prescribe antipsychotic drugs on a trial and error basis as there is no accurate method of determining how a patient will respond to a particular drug.<sup>66</sup> Since some patients who fail to respond to one particular antipsychotic drug may respond to another, a physician may have to prescribe several drugs before the most effective one is found for the patient.<sup>67</sup> Furthermore, because in most cases schizophrenia is a chronic disorder, never fully going into remission, drug therapy must continue indefinitely.<sup>68</sup> Finally not only will antipsychotic medication provide no benefit to some patients, but almost all patients fail to completely respond to the drugs.<sup>69</sup>

Notwithstanding its limitations, "[p]sychotropic medication is widely accepted within the psychiatric community as an extraordinarily effective treatment for both acute and chronic psychoses, particularly schizophrenia."<sup>70</sup> Antipsychotic medication remains "the primary modality in the treatment of an acute episode or an acute exacerbation of schizophrenic illness."<sup>71</sup> Indeed, one authority has argued that "[t]he available data do not support the feasibility of substituting any psychotherapeutic strategy for drug treatment on an indefinite basis."<sup>72</sup> Others have asserted that "there is still no single substitute for [antipsychotic drugs] for control of symptoms and prevention of relapse in the majority of chronic schizophrenic patients. Denying these patients the benefit of [antipsychotic drugs] without offering any suitable alternative may be

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63. Samuel J. Keith, *Drugs: Not the Only Treatment*, 33 HOSP. & COMMUNITY PSYCHIATRY 793, 793 (1982) (Commentary); Leo E. Hollister, *Antipsychotic and Antimanic Drugs*, in REVIEW OF GENERAL PSYCHIATRY 590, 595 (Goldman ed. 1984).

64. Keith, *supra* note 63, at 793.

65. Ross J. Baldessarini & Frances R. Frankenburg, *Clozapine: A Novel Antipsychotic Agent*, 324 NEW ENG. J. MED. 746, 746 (1991); Walter A. Brown & Lawrence R. Herz, *Response to Neuroleptic Drugs as a Device for Classifying Schizophrenia*, 15 SCHIZOPHRENIA BULL. 123, 123 (1989).

66. Cichon, *supra* note 3, at 296; Kemna, *supra* note 46, at 110-11; see also Philip R. A. May et al., *Predicting Individual Responses to Drug Treatment in Schizophrenia: A Test Dosage Model*, 162 J. NERVOUS & MENTAL DISEASE 177, 177-78 (1976).

67. Hollister, *supra* note 63, at 595.

68. *Id.*

69. *Id.* at 593.

70. *Harper*, 494 U.S. at 226 n.9 (quoting Brief for American Psychiatric Association as *amicus curiae* at 10-11).

71. John M. Kane, *Treatment of Schizophrenia*, 13 SCHIZOPHRENIA BULL. 133, 134 (1987).

72. *Id.* at 142.

considered a clinical error.”<sup>73</sup>

However, the uncertainty and fallibility of psychiatric diagnosis further limits the potential benefits of antipsychotic drugs.<sup>74</sup> It has been estimated that psychiatrists misdiagnosed patients as schizophrenic as much as forty per cent of the time.<sup>75</sup> To the extent that antipsychotic medication is the treatment of choice for schizophrenia,<sup>76</sup> both the frequent misdiagnoses of patients, together with the numerous well-recognized side effects of drug treatment,<sup>77</sup> present a troubling situation.

### *B. Side Effects of Psychotropic Medication*

Both antipsychotic drugs and other psychotropic drugs produce numerous debilitating side effects that range from unpleasant to life threatening and even fatal.<sup>78</sup> Many side effects fall within the category of extrapyramidal symptoms.<sup>79</sup> Akathesia is one of the most common extrapyramidal symptoms.<sup>80</sup> Uncontrollable physical restlessness, agitation, pacing, anxiety and panic characterize this syndrome.<sup>81</sup> Other symptoms of akathesia “include a constant tapping of feet, alteration of posture . . . and an inability to feel comfortable in any position.”<sup>82</sup> Psychiatrists often fail to diagnose akathesia as it may be impossible to distinguish between akathesia and psychotic excitement.<sup>83</sup> Because

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73. Dilip V. Jeste & Richard Jed Wyatt, *Changing Epidemiology of Tardive Dyskinesia: An Overview*, 138 AM. J. PSYCHIATRY 297, 306 (1981).

74. See ROBERT M. LEVY & LEONARD S. RUBENSTEIN, *THE RIGHTS OF PEOPLE WITH MENTAL DISABILITIES* 111 (1996); see also *Ake v. Oklahoma*, 470 U.S. 68, 81 (1985); *Addington v. Texas*, 441 U.S. 418, 429 (1979); Brooks, *supra* note 47, at 352 (stating “[m]any non-schizophrenic patients are incorrectly diagnosed as schizophrenic and forced to take harmful medications that provide no benefit whatsoever”); Bruce J. Ennis & Thomas R. Litwack, *Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom*, 62 CAL. L. REV. 693, 711-19 (1974) (discussing many reasons to question the validity of psychiatrists’ diagnoses of schizophrenia); Alan A. Lipton & Franklin S. Simon, *Psychiatric Diagnosis in a State Hospital: Manhattan State Revisited*, 36 HOSP. & COMMUNITY PSYCHIATRY 368, 370 (1985) (reporting 73 out of 89 patients misdiagnosed as schizophrenic).

75. Cichon, *supra* note 3, at 296.

76. See *supra* notes 70-73 and accompanying text; see also Sheldon Gelman, *Mental Hospital Drugs, Professionalism and the Constitution*, 72 GEO. L.J. 1725, 1727 & n.20 (1984) (detailing near universal use of drugs in state psychiatric hospitals).

77. See *supra* notes 74-75 and accompanying text; see also *infra* notes 78-128 and accompanying text.

78. *Harper*, 494 U.S. at 229.

79. Extrapyramidal side effects involve an impairment of the motor system which controls muscular movement. Kemna, *supra* note 46, at 112; Cichon, *supra* note 3, at 300.

80. Brooks, *supra* note 47, at 348.

81. *Id.*

82. Cichon, *supra* note 3, at 301.

83. Theodore Van Putten & Stephan R. Marder, *Behavioral Toxicity of Antipsychotic Drugs*,

psychiatrists often misinterpret symptoms of akathesia as a worsening of a patient's psychiatric condition, physicians will react by increasing the dosage level of medication.<sup>84</sup> Over twenty per cent of the patients who receive antipsychotic drugs suffer from akathesia.<sup>85</sup>

Akinesia is another extrapyramidal side effect that antipsychotic medication produces. Akinesia is a behavioral state of diminished capacity that is characterized by unspontaneous speech, apathy and a difficulty in initiating activities.<sup>86</sup> For patients who suffer from akinesia, "reading and talking become virtually impossible."<sup>87</sup>

Dystonic reactions are another type of extrapyramidal symptom. They are characterized by muscle spasms, particularly in the eyes, neck, face and arms.<sup>88</sup> Dystonic reactions are temporary and will disappear when patients end their regimen of antipsychotic medication.<sup>89</sup>

Antipsychotic drugs also produce extrapyramidal symptoms known as parkinsonism, whose symptoms mimic those of Parkinson's disease.<sup>90</sup> An individual who manifests parkinsonism manifests a "mask-like face, drooling, muscle stiffness and rigidity."<sup>91</sup> Studies indicate that anywhere from "five to ninety percent of patients treated with antipsychotic drugs" suffer from parkinsonism.<sup>92</sup>

The most damaging extrapyramidal symptom, and the one that has generated the most scrutiny and disagreement is tardive dyskinesia. Tardive dyskinesia is a syndrome associated with the long-term use of antipsychotic drugs,<sup>93</sup> and has been described as a significant public health hazard.<sup>94</sup> Tardive dyskinesia involves the involuntary movements of facial, arm, leg, or truncal musculature.<sup>95</sup> Such movements involve the sucking or smacking of lips and, at the very least, are grotesque and humiliating.<sup>96</sup> In more serious cases, individuals may have

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48 J. CLINICAL PSYCHIATRY 13, 13 (1987).

84. Peter J. Weiden et al., *Clinical Nonrecognition of Neuroleptic-Induced Movement Disorders: A Cautionary Study*, 144 AM. J. PSYCHIATRY 1148, 1151 (1987); May et al., *supra* note 66, at 178.

85. Brooks, *supra* note 47, at 350 (citing TASK FORCE ON LATE NEUROLOGICAL EFFECTS OF ANTIPSYCHOTIC DRUGS: TARDIVE DYSKINESIA (Am. Psychiatric Ass'n ed., 1980), summarized in *Task Force Report of the American Psychiatric Association*, 137 AM. J. PSYCHIATRY 1163 (1980) [hereinafter NEUROLOGICAL EFFECTS OF ANTIPSYCHOTIC DRUGS].

86. Van Putten & Marder, *supra* note 83, at 15.

87. Cichon, *supra* note 3, at 301.

88. *Id.* at 303.

89. See Plotkin, *supra* note 3, at 475.

90. Cichon, *supra* note 3, at 300.

91. Plotkin, *supra* note 3, at 475; Kemna, *supra* note 46, at 112.

92. Cichon, *supra* note 3, at 300.

93. *Id.* at 304.

94. Jeste & Wyatt, *supra* note 73, at 297.

95. See "Mind Control", *supra* note 55, at 109.

96. Brooks, *supra* note 47, at 349; Dilip V. Jeste et al., *The Biology and Experimental*

difficulty swallowing, talking and breathing.<sup>97</sup>

There is substantial disagreement about the ability of the medical profession to detect and control the disorder. Some authorities believe that although the symptoms of tardive dyskinesia appear while a patient is taking medication, because antipsychotic drugs often mask the onset of the disorder, the symptoms "may not become clinically evident until the drug is either decreased or discontinued."<sup>98</sup> Furthermore, psychiatrists often fail to diagnose symptoms of tardive dyskinesia.<sup>99</sup> For example, one study found that psychiatrists failed to recognize symptoms of tardive dyskinesia ninety per cent of the time.<sup>100</sup> Perhaps because many psychiatrists believe that antipsychotic medication can do no wrong,<sup>101</sup> when confronted with patients who suffer from the disorder, many psychiatrists accuse patients of faking their symptoms.<sup>102</sup> Significantly, it is impossible to predict which patients will suffer from the disorder and the disorder is irreversible.<sup>103</sup> However, some authorities believe that at least milder forms of tardive dyskinesia may abate when a physician discontinues or reduces a patient's medication.<sup>104</sup>

There has frequently been disagreement about the incidence of tardive dyskinesia.<sup>105</sup> Some studies place the incidence of tardive dyskinesia at over fifty per cent.<sup>106</sup> In contrast, the American Psychiatric Association places the

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*Treatment of Tardive Dyskinesia and Other Related Movement Disorders*, in 8 AMERICAN HANDBOOK OF PSYCHIATRY 536, 537 (Berger & Brodie eds., 2d ed. 1986).

97. Cichon, *supra* 3 note, at 304; *see also* Jeste et al., *supra* note 96, at 538 (reporting that physical complications include respiratory irregularities and/or speech abnormalities, retching and vomiting).

98. *See* Kenneth A. Kessler & Jeremy P. Waletzky, *Clinical Use of Antipsychotic*, 138 AM. J. PSYCHIATRY 202, 205 (1981); Jeste et al., *supra* note 96, at 560.

99. *See, e.g.*, Cichon, *supra* note 3, at 306; LEVY & RUBENSTEIN, *supra* note 74, at 112.

100. Weiden et al., *supra* note 84, at 1150; *see also* Gelman, *supra* note 76, at 1755 (detailing substantial failure of physicians employed by state hospitals to diagnose tardive dyskinesia).

101. Gelman, *supra* note 76, at 1759.

102. *Id.* at 1756.

103. *See* Jeste et al., *supra* note 96, at 560 ("We estimate in approximately one-third of these patient in whom neuroleptics are stopped, TD will disappear. The remaining two-thirds of these patients will have persistent TD. . . . To date, there is no specific curative treatment for persistent TD."); Brooks, *supra* note 47 at 349; Gelman, *supra* note 76, at 1752.

104. Philip V. Jeste & Richard Jed Wyatt, *In Search of Treatment for Tardive Dyskinesia: Review of the Literature*, 5 SCHIZOPHRENIA BULL. 251, 269, 275 (1979); *see also* Mary Ann Richardson & Daniel E. Casey, *Tardive Dyskinesia Status: Stability or Change*, 24 PSYCHOPHARMACOLOGY BULL. 471, 474 (1988); "Mind Control", *supra* note 55, at 109; Daniel E. Casey et al., *Neuroleptic Induced Tardive Dyskinesia and Parkinsonism: Changes During Several Years of Continuing Treatment*, 22 PSYCHOPHARMACOLOGY BULL. 250, 251 (1986).

105. *See* Cichon, *supra* note 3, at 306.

106. *See, e.g.*, Cichon, *supra* note 3, at 306 (citing, *inter alia*, ALAN F. SCHATZBERG & JONATHAN O. COLE, MANUAL OF CLINICAL PSYCHOPHARMACOLOGY 99 (1986) (reporting incidence of tardive dyskinesia at 56%); Robert Sovner et al., *Tardive Dyskinesia and Informed Consent*, 19

prevalence of tardive dyskinesia at the significantly lower rate of ten to twenty percent of patients.<sup>107</sup> Even the federal judiciary has been unable to agree on the incidence of tardive dyskinesia. The district court in *Rogers*<sup>108</sup> placed the incidence of tardive dyskinesia at fifty and fifty-six percent.<sup>109</sup> However, the Supreme Court concluded that a "fair reading of the evidence" places the incidence of tardive dyskinesia at ten to twenty-five percent.<sup>110</sup> In terms of total numbers, one authority estimates that one to two million individuals suffer from tardive dyskinesia in any given year.<sup>111</sup>

Another potentially devastating side effect is neuroleptic malignant syndrome. Neuroleptic malignant syndrome produces fever, skeletal rigidity, elevated blood pressure, delirium, mutism, stupor and coma.<sup>112</sup> It is estimated that approximately two per cent of patients who use neuroleptic medication will suffer from neuroleptic malignant syndrome.<sup>113</sup> Accordingly, because of the large numbers of patients for whom a regimen of antipsychotic medication has been prescribed, "even a conservative estimate would place the annual prevalence of neuroleptic malignant syndrome in the United States in the thousands of cases, a significant number of which may have fatal consequences."<sup>114</sup> Indeed, it is estimated that neuroleptic malignant syndrome produces death twenty to thirty per cent of the time.<sup>115</sup>

Antipsychotic drugs produce many other side effects. Blurred vision, dry mouth and interference with sexual functioning are common.<sup>116</sup> Weight gain is also common.<sup>117</sup> The medication can also produce agranulocytosis which is a hematological side effect characterized by sore throat, fever, fatigue, lethargy and other signs of infection, jaundice, skin discoloration, and eye lesions.<sup>118</sup>

While antipsychotic medication is the treatment of choice for psychosis,

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PSYCHOSOMATICS 172, 173 (1978) (reporting incidence of tardive dyskinesia at 56 %)); *see also* LEVY & RUBENSTEIN, *supra* note 74, at 113.

107. NEUROLOGICAL EFFECTS OF ANTIPSYCHOTIC DRUGS, *supra* note 85, at 1165.

108. 478 F. Supp. 1342 (D. Mass. 1979).

109. *Id.* at 1360.

110. Washington v. Harper, 494 U.S. 210 (1990).

111. Cichon, *supra* note 3, at 307.

112. *Id.* at 308.

113. See Gerald Addonizio et al., *Symptoms of Neuroleptic Malignant Syndrome in 82 Consecutive Inpatients*, 143 AM. J. PSYCHIATRY 1587, 1588 (1986); *see also* Harrison G. Pope et al., *Frequency and Presentation of Neuroleptic Malignant Syndrome in a Large Psychiatric Hospital*, 143 AM. J. PSYCHIATRY 1227, 1231 (1986) (finding incidence of neuroleptic malignant syndrome of 1.4%).

114. Pope et al., *supra* note 113, at 1232.

115. Cichon, *supra* note 3, at 308.

116. Gelman, *supra* note 76, at 1745.

117. Hollister, *supra* note 63, at 596.

118. People v. Medina, 705 P.2d 961, 968 n.3 (Colo. 1985); THE MERCK MANUAL 1174 (Robert Berkow ed., 15th ed. 1987).

lithium is the indicated treatment for manic episodes of bipolar disorder,<sup>119</sup> otherwise characterized as manic-depressive illness.<sup>120</sup> Like antipsychotic drugs, lithium also produces debilitating side effects. Lithium's impact on the central nervous system range from commonly observed side effects to life-threatening irreversible brain damage in rare instances of lithium toxicity.<sup>121</sup> Patients whose lithium levels are within ordinary therapeutic ranges can suffer from lithium toxicity.<sup>122</sup> Toxic effects of lithium are initially manifested by gross tremors, persistent headache, vomiting, and mental confusion.<sup>123</sup> They "may progress to stupor, seizures, and cardiac arrhythmias."<sup>124</sup> Lithium can harm the body's immunological system<sup>125</sup> and contribute to cardiac failure of patients who have a familial history of heart disease.<sup>126</sup>

Like antipsychotic drugs, lithium can produce extrapyramidal symptoms.<sup>127</sup> In fact, the use of lithium and antipsychotic medication together increases both the risk and severity of extrapyramidal symptoms.<sup>128</sup>

In sum, the drugs that patients receive, particularly antipsychotic medications, are nothing short of hazardous.<sup>129</sup> Indeed, "antipsychotic drug[s] cause[] severe harms . . . on a far broader scale than lobotomy ever did."<sup>130</sup> The nature of antipsychotic medication is such that one court has concluded that "[e]ven acutely disturbed patients might have good reason to refuse these drugs."<sup>131</sup>

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119. See PHYSICIAN'S DESK REFERENCE 1923 (45th ed. 1991). A manic episode is a distinct period of an elevated, expansive mood, and associated symptoms of, *inter alia*, increased activity, a flight of ideas, inflated self esteem, decreased need for sleep, and an "excessive involvement in activities without recognition of the high potential for painful consequences." COMPREHENSIVE TEXTBOOK OF PSYCHIATRY 765 (Harold I. Kaplan & Benjamin J. Sadeck ed., 4th ed. 1985) [hereinafter TEXTBOOK OF PSYCHIATRY].

120. TEXTBOOK OF PSYCHIATRY, *supra* note 119, at 765.

121. Barry Reisberg & Samuel Gershon, *Side Effects Associated with Lithium Therapy*, 36 AM. J. PSYCHIATRY 879, 879 (1979).

122. *Id.* at 880.

123. See MERCK MANUAL, *supra* note 118, at 1530.

124. *Id.*

125. See Vikram R. Shukla & Richard L. Borison, *Lithium and Lupuslike Syndrome*, 248 JAMA 921, 921 (1982) (Letter to the Editor).

126. See Reisberg & Gershon, *supra* note 121, at 882.

127. See John Kane et al., *Extrapyramidal Side Effects with Lithium Treatment*, 135 AM. J. PSYCHIATRY 851, 852 (1978).

128. See D. Thomas Blair, *Risk Management for Extrapyramidal Symptoms*, 16 JOINT COMM'N ON ACCREDITATION OF HOSPITALS: QUALITY REVIEW BULL. 116, 121 (1990); Hollister, *supra* note 63, at 598.

129. See *Stone v. Smith, Kline & French Labs.*, 731 F.2d 1575, 1578 (11th Cir. 1984) (concluding that the lower court correctly found that the antipsychotic drug Thorazine is "unavoidably unsafe").

130. Gelman, *supra* note 44, at 1265.

131. *Rennie II*, 476 F. Supp. at 1299.

## II. AN HISTORIC OVERVIEW OF THE RIGHT OF REFUSE DRUGS UNDER FEDERAL LAW

### A. *The Initial Federal Litigation*

1. *Rogers v. Okin*.<sup>132</sup>—*Rogers I* involved a challenge to medication and seclusion practices at Boston State Hospital.<sup>133</sup> The district court concluded that the right to accept or refuse medication is part of the right to privacy and is “fundamental” to any concept of ordered liberty.<sup>134</sup> However, compelling state interests may override the right to refuse.<sup>135</sup> The safety of the community is one such interest, although the civil commitment of individuals mentally ill and dangerous satisfies this interest.<sup>136</sup> Hence, members of the hospital community are at risk only in emergency situations and consequently, the state may forcibly administer medication only when an emergency exists within the hospital.<sup>137</sup>

On appeal, the First Circuit concluded that as part of any right to privacy, bodily integrity or personal security, an individual has a right to decide for himself whether or not to submit to a potentially harmful regimen of antipsychotic medication.<sup>138</sup> A decision to override a patient’s choice to refuse drugs, according to the court, requires a determination that the need to prevent violence in a particular situation outweighs the possibility of harm to the medicated patient, and reasonable alternatives to medication have been ruled out.<sup>139</sup> Further, a court should leave this assessment to hospital doctors and limit its role to designing procedures that would protect patients’ interests.<sup>140</sup>

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132. 478 F. Supp. 1342, 1353 (D. Mass. 1979).

133. The seclusion practices of the hospital were not subject to appellate review. *See Rogers II*, 634 F.2d at 653.

134. *Rogers I*, 478 F. Supp. at 1366.

135. *Id.* at 1368.

136. *Id.* at 1368-69.

137. *Id.* at 1365, 1369. The court defined “emergency” as a situation in which a failure to medicate “would result in a substantial likelihood of physical harm” to the patient himself, other patients or hospital staff. *Id.* at 1365. In so holding the court concluded that the government’s interest in providing needed treatment simply did not override the patient’s right to refuse. *Id.* at 1369.

138. *Rogers II*, 634 F.2d at 653.

139. *Id.* at 655-56.

140. *Id.* at 656-57. The First Circuit recognized further that the state’s *parens patriae* power authorized the forcible administration of medication to patients who lacked the ability to make treatment decisions. However, if a hospital sought to medicate over objection only for treatment purposes, the facility must obtain a determination that the patient lacked the capacity to decide for himself whether or not to accept the medication. *Id.* at 657. The court of appeals further held that the district court erred when it defined an emergency as a situation that requires immediate action to prevent physical harm. *Id.* at 659-60. Rather, situations existed in which the need to administer medication to prevent further deterioration of a patient also rose to the level of an emergency.

When the case reached the Supreme Court, the Court framed the substantive issue of the right to refuse by defining the constitutional interest involved and then identifying conditions under which competing state interests might outweigh an individual's right.<sup>141</sup> The Court articulated further that the substantive protections arising directly from the Constitution detail only a minimum and state law may recognize liberty interests broader than those directly protected within the Constitution.<sup>142</sup> Because the Due Process Clause protects state-created liberty interests, "the full scope of a patient's due process rights may depend in part on the substantive liberty interests created by state as well as federal law."<sup>143</sup> Analysis of state law is particularly important "[t]o identify the nature and scope of state interests that are to be balanced against an individual liberty interest."<sup>144</sup> Since the Massachusetts Supreme Court's disposition in *Guardianship of Roe*<sup>145</sup> may have "put into doubt, if not altered" the underlying state-law predicate for the weighing of the state interests,<sup>146</sup> the Supreme Court remanded *Rogers III* to the court of appeals.

2. *Rennie v. Klein*.<sup>147</sup>—*Rennie I* involved a challenge to the forcible administration of medication by a patient confined at Aurora Psychiatric Hospital

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Accordingly, the First Circuit vacated the district court's definition of emergency and remanded the case for "consideration of alternative means for making incompetency determinations in situations where any delay could result in significant deterioration of a patient's health." *Id.* at 660.

141. *Rogers III*, 457 U.S. at 299. In engaging in this substantive due process analysis, the Supreme Court assumed for purposes of this case that involuntarily hospitalized patients retain liberty interests protected directly by the Constitution and the forcible administration of antipsychotic drugs implicates these interests. *Id.* at 299 n.16.

142. *Id.* at 300. The Court's citations to *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 7, 12 (1979), and subsequently, *Vitek v. Jones*, 445 U.S. 480 (1980), are particularly relevant in determining the meaning and scope of *Rogers III*. If one reads the Court's discussion of interests under state law as simply a precursor to a remand for an examination of state law because protections created by state law are broader than those arising directly from the Constitution then this decision has little significance when evaluating Supreme Court discussion on the right to refuse. Both the court of appeals on remand and a district court interpreted *Rogers III* in this manner. See *Rogers IV*, 738 F.2d at 4; R.A.J. v. Miller, 590 F. Supp. 1319, 1322 (N.D. Texas 1984). However, *Vitek* and *Greenholtz* focused on the issue of state-created liberty interests that the Federal Constitution protects. The Court's citation to these cases and its recognition that the Due Process Clause of the Fourteenth Amendment protects rights created by both state and federal law strongly suggests that the Court remanded *Rogers III* not to determine whether state law rendered moot the patients' federal claims, but whether intervening state law identified state interests that might outweigh the patients' liberty interests. See *Rogers III*, 457 U.S. at 299. For a full discussion of the significance of this aspect of *Rogers III*, see *infra* notes 404-18 and accompanying text.

143. *Rogers III*, 457 U.S. at 300.

144. *Id.* at 304.

145. 421 N.E.2d 40 (Mass. 1981).

146. *Rogers III*, 457 U.S. at 304.

147. 462 F. Supp. 1131 (D.N.J. 1978) [hereinafter *Rennie I*].

in New Jersey. Ruling on a preliminary injunction motion, the district court held that the right of privacy included the right to refuse psychotropic medication.<sup>148</sup> Accordingly, the court held that a patient “may challenge the forced administration of drugs on the basis that alternative treatment methods should be tried before a more intrusive technique like psychotropic medication is used.”<sup>149</sup> However, while the right of privacy encompassed the right to refuse drugs, the government’s interest in protecting other patients and hospital staff was sufficiently compelling to override the plaintiff’s right to refuse.<sup>150</sup> Although the court never definitively detailed other state interests that would compel the forced administration of medication, the court recognized that some patients lacked sufficient insight into their illness warranting the forced administration of medication.<sup>151</sup> In sum, the *Rennie I* court held that a decision to administer medication required an assessment of four factors when evaluating a patient’s refusal: (1) the physical threat to other patients and staff; (2) the patient’s capacity to decide on his course of treatment; (3) the existence of any less restrictive alternatives; and (4) the risk of permanent side effects from the medication.<sup>152</sup> Subsequently, the plaintiff moved to amend his complaint to contain class allegations and the court certified the lawsuit as a class action.<sup>153</sup> The court then issued a class-wide decision enjoining the forced administration of medication in non-emergency situations.<sup>154</sup>

The court of appeals, sitting *en banc*, recognized that while state law gives rise to a liberty interest when it creates a right or expectation rooted in state law,<sup>155</sup> no such state created interest existed in New Jersey as state law only permitted voluntary patients to refuse medication.<sup>156</sup> The court reasoned that by implication, “involuntarily committed patients do not have this right and a [state

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148. *Id.* at 1144.

149. *Id.* at 1146 (quoting Bruce J. Winick, *Psychotropic Drugs and Competence to Stand Trial*, 1977 AM. B. FOUND RES. J. 769, 813). The court also recognized procedural due process concerns arising from the state’s attempt to administer medication over objection. To address these concerns, for all non-emergency situations the court required: a hearing to address the need for medication, a lawyer for the patient and an independent psychiatrist to evaluate a hospital’s decision to medicate. Finally, the hospital must provide the patients’ counsel and independent psychiatrist with access to the hospital record. *Id.* at 1147-48.

150. *Id.* at 1145.

151. *Id.* at 1146.

152. *Id.* at 1148.

153. *Rennie II*, 476 F. Supp. 1294, 1297-98 (D.N.J. 1979).

154. *Id.* at 1313-14. Most of the injunction addressed procedural rights of patients who sought to refuse medication. *Id.* at 1313-15. For instance when a hospital sought to forcibly medicate a patient, the court directed an independent psychiatrist to conduct a hearing in which the factfinder was to evaluate both the four factors detailed in *Rennie I* and the existence of any possible First or Eighth Amendment violations. *Id.* at 1314-15.

155. *Rennie III*, 653 F.2d at 841-42.

156. *Id.* at 842.

court] had so held.”<sup>157</sup> Notwithstanding the absence of a state created liberty interest in refusing medication, involuntarily hospitalized patients retained a ““residuum of liberty””<sup>158</sup> infringed by forced drugging since compulsory medication with antipsychotic drugs amounted to a ““major change in the conditions of confinement.””<sup>159</sup> The court concluded that forced drugging implicated the right to remain free from ““unjustified intrusions on personal security.””<sup>160</sup>

A majority of the *Rennie III* court adopted a least intrusive means standard for detailing circumstances when government interests will override a patient’s interest in refusing medication.<sup>161</sup> The least intrusive means standard did not prohibit all unwanted intrusions produced by medication. Rather, this criteria prohibited forced druggings “which are unnecessary or whose cost benefit ratios, weighed from the patient’s standpoint, are unacceptable.”<sup>162</sup>

On July 2, 1982, two weeks after the Supreme Court remanded *Rogers III*, the Court rendered a decision in *Rennie IV*.<sup>163</sup> In a summary order, the Court remanded *Rennie IV* for further consideration in light of *Youngberg*,<sup>164</sup> which the Court decided on June 18, 1982, the same day it decided *Rogers III*.<sup>165</sup>

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157. *Id.* (citing *In re B.*, 383 A.2d 760 (N.J. Super. Ct. Law. Div. 1977)).

158. *Id.* at 843 (quoting *Vitek v. Jones*, 445 U.S. 480, 491 (1980)).

159. *Id.* (quoting *Wolff v. McDonnell*, 418 U.S. 539, 571-72 n.19 (1974)).

160. *Id.* at 844 (citing *Ingraham v. Wright*, 430 U.S. 651, 673 (1977)).

161. *Id.* at 845.

162. *Id.* at 847. In an appendix the Court ordered that medication is considered necessary when either (1) the party is incapable, without medication, of participating in any treatment plan that will provide the patient with a realistic opportunity of improving his condition; or (2) although the hospital can devise a plan that will give the patient a realistic opportunity of improving his condition, (a) the provision of medication would probably improve the patient’s condition in a significantly shorter time, or (b) a significant possibility exists that the patient will harm himself or others before his condition improves in the absence of medication. *Id.* at 853.

Eight of the judges held that administrative regulations promulgated after the filing of *Rennie III* satisfied substantive standards. *Id.* at 851-52. The regulations permitted the forcible administration of medication under the following circumstances: (1) when a patient was incapable, without medication, of participating in a treatment plan that would provide him with a realistic opportunity of improving his condition; (2) the administration of medication would probably improve the patient’s condition in a significantly shorter period of time; or (3) there was a significant possibility that, in the absence of the provision of medication, the patient would harm himself or others before improvement of his condition is realized; and (4) the existence of an emergency. *Id.* at 852-53.

163. 458 U.S. 1119 (1982).

164. 457 U.S. 307 (1982).

165. See *Rogers III*, 457 U.S. at 291; *Youngberg*, 457 U.S. at 307.

*B. Case Law Subsequent to the Supreme Court's Decisions  
in Rogers III and Rennie IV*

After the Supreme Court's remand of *Rennie IV* in light of *Youngberg* the federal courts adopted the professional judgment standard of *Youngberg* and denied civil commitment patients the right to refuse medication unless a physician's authorization decision failed to satisfy the professional judgment standard.<sup>166</sup> Cases arose in a number of different contexts; federal courts' reliance upon the *Youngberg* standard ranged from blind adherence, without any examination as to the appropriateness of adopting the professional judgment standard, to an *en banc* reconsideration of the issue in *Rennie V* in which seven out of ten judges in three different opinions adopted the professional judgment test in one form or another.<sup>167</sup>

On remand in *Rennie V*, the Third Circuit became the first federal court to re-evaluate the scope of the right to refuse after the Supreme Court's dispositions of *Rogers III* and *Rennie IV*. The court examined the scope of the right to refuse by evaluating the constitutionality of the substantive standards within the New Jersey regulations authorizing forcible administration of medication.<sup>168</sup> Five judges held that physicians may administer medication over objection when in the exercise of professional judgment the physician determined that a patient poses a threat of harm to himself or others.<sup>169</sup> Chief Judge Seitz, in concurrence,

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166. See, e.g., *Walters v. Western State Hosp.*, 864 F.2d 695, 698-99 (10th Cir. 1988); *Dautremont v. Broadlawns Hosp.*, 827 F.2d 291, 300 (8th Cir. 1987); *Rennie V*, 720 F.2d 266, 269-74 (3d Cir. 1983) (*en banc*); *Johnson v. Silvers*, 742 F.2d 823, 825 (4th Cir. 1984); *Project Release v. Prevost*, 722 F.2d 960, 977-81 (2d Cir. 1983); *R.A.J. v. Miller*, 590 F. Supp. 1319, 1321 (N.D. Tex. 1984).

167. *Rennie V*, 720 F.2d at 269, 272, 274.

168. *Id.* at 270 & n.9. See *supra* note 162 for the standards set forth in the administrative provisions in question.

169. *Rennie V*, 720 F.2d at 269-70. Comparing the opinion of the court, written by Judge Garth, and joined by Judges Aldisert and Hunter, with the concurring opinion of Judge Adams, joined by Judge Becker, indicates that members of the court had difficulty understanding each other. Although all five judges concluded that a hospital could override a patient's decision to refuse medication when a physician, in the exercise of professional judgment deems that the patient poses a danger to himself or others, Judge Adams refused to join the opinion by Judge Garth. Judge Adams noted that under New Jersey law, the state could not involuntarily hospitalize a patient unless he posed a danger to himself or others. Judge Adams then interpreted Judge Garth's opinion to hold that the determination of dangerousness in the context of civil commitment justified a determination of dangerousness within a hospital setting that would permit the forcible administration of medication. This, Judge Adams believed, did not afford sufficient protection to patients. *Id.* at 272.

However, Judge Garth's opinion reveals that he never clarified what he meant by danger to oneself or others. At no time did Judge Garth define the phrase as either posing a danger within a hospital setting or posing a threat outside of a hospital that would justify civil commitment. Notwithstanding Judge Adams' attempt to distinguish his opinion from that of the Court, Judge

concluded that the professional judgment standard of *Youngberg* governed the administration of medication over objection, although a physician must consider the patient's welfare and society's interests.<sup>170</sup> Accordingly, the Chief Judge continued, any forced drugging must be part of an effort to treat mental illness "or in response to, or in anticipation of, [a] patient's violent outbreaks."<sup>171</sup>

In an opinion written by Judge Weis, four judges rejected application of the *Youngberg* standard in the refusal of treatment context.<sup>172</sup> These judges further concluded that the administration of medication must satisfy the "least intrusive means" test.<sup>173</sup> Nevertheless, these judges permitted the professional judgment standard to govern this case as long as the decision to administer medication included a least intrusive means consideration, namely, "a cost-benefit analysis viewed from the patient's perspective."<sup>174</sup> In sum, nine of the ten judges concluded that the regulations promulgated by the State of New Jersey satisfied due process because they required physicians to exercise professional judgment, in one form or another, when administering medication.<sup>175</sup>

In *Project Release v. Prevost*,<sup>176</sup> the Second Circuit became the second court after the Supreme Court's remand of *Rennie IV* to examine the scope of the right to refuse. Like the Third Circuit, the Second Circuit evaluated the right to refuse in light of administrative regulations that governed the forcible administration of medication and upheld the regulations because the regulations required the exercise of professional judgment.<sup>177</sup>

In a rather convoluted opinion, the *Project Release* court recognized how the Supreme Court observed in *Rogers III* that state law could create an interest in refusing medication.<sup>178</sup> The Second Circuit determined that New York's administrative regulations served as a source of such a state created interest.<sup>179</sup>

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Garth noted that the standard set forth by Judge Adams did not differ from his. *Id.* at 269 n.6.

170. *Id.* at 274.

171. *Id.*

172. *Id.* at 275.

173. *Id.* at 276. For a full discussion of the least intrusive means/least restrictive alternative test, see *infra* notes 454-72 and accompanying text.

174. *Id.* at 276. Judge Weis reconciled the least intrusive means test with the professional judgment standard by noting that the least intrusive means test requires professionals to give greater consideration to the potential harmful effects of medication than any administrative or economic concerns arising out the administration of medication. *Id.*

175. Judge Gibbons dissented from the court's opinion, believing that, for the reasons given in his dissent to the original Third Circuit opinion, the court of appeals should not have modified the issuance of the preliminary injunction issued by the district court. *Id.* at 277. In his original dissent, Judge Gibbons concluded that the findings of rights violations by the district court were not clearly erroneous. *Rennie III*, 653 F.2d at 865-70.

176. 722 F.2d 960 (2d Cir. 1983).

177. *Id.*

178. *Id.* at 979 (citing *Rogers III*, 457 U.S. at 300).

179. *Id.* (citing N.Y. COMP. CODES R. & REGS. tit. 14, §§ 27.8 and 27.9 (1983)). The court also noted that state statutory law encompassed any substantive right to refuse medication that

However, a court had to weigh any right to refuse against relevant state interests. The court then noted that the Supreme Court remanded *Rennie IV* in light of *Youngberg*.<sup>180</sup> As such, *Youngberg* provided guidance for evaluating the standards for objecting to treatment. Without examining the content of any standards, the court concluded that because the regulations afforded an opportunity for the exercise of professional judgment, the regulations satisfied due process.<sup>181</sup>

Regardless of the merits of utilizing the professional judgment standard to govern the right to refuse,<sup>182</sup> other courts soon applied the professional judgment standard in the refusal of treatment context.<sup>183</sup>

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might exist. The statute in question, Mental Hygiene Law § 33.03(a), provided that “[e]ach patient in a facility and each person receiving services for mental disability shall receive care and treatment that is suited to his needs and skillfully, safely and humanely administered *with full respect for his dignity and personal integrity.*” *Id.* (emphasis in opinion).

180. *Id.* at 980.

181. *Id.* at 980-81.

182. For a discussion of the appropriateness of utilizing the professional judgment standard in the refusal of treatment context, see *infra* notes 213-69 and accompanying text.

183. For example, two circuit courts and two district courts expressed a willingness to adopt the professional judgment standard within a year of the Supreme Court’s remand of *Rennie IV*. *Johnson v. Silvers*, 742 F.2d 823 (4th Cir. 1984), involved a determination governing the sufficiency of a *pro se* complaint in which a civilly committed patient sought damages. Although the court of appeals overturned the dismissal of the complaint by the district court, the appellate court held that the professional judgment standard controlled. In order for the patient to prevail, he would have to establish that the physician who directed him to take medication failed to exercise professional judgment. *Id.* at 825.

In *Dautremont v. Broadlawns Hospital*, 827 F.2d 291 (8th Cir. 1987), a psychiatrically hospitalized patient sought damages for a number of purported violations including the administration of medication over objection. In assessing the scope of the patient’s right to refuse drugs, the Eighth Circuit applied the professional judgment standard. The court of appeals then held that the government’s legitimate objective of restoring the patient’s behavior to acceptable societal standards and the doctors’ reasonable professional judgment that the administration of medication could best accomplish this goal outweighed the patient’s liberty interest in refusing medication. *Id.* at 300.

The patient in *Dautremont* also argued that Iowa law created a liberty interest in refusing medication unless the administration of drugs was necessary to preserve life or control behavior that was likely to result in physical injury to himself or others. The court of appeals did not squarely address this issue; the court held that assuming state law created such a liberty interest, because the patient posed a danger to himself and others, the administration of medication was justified. *Id.* at 298.

In *R.A.J. v. Miller*, 590 F. Supp. 1319 (N.D. Tex. 1984), a district court relied upon *Rennie IV* and *Project Release* and applied the *Youngberg* standard in evaluating a putative settlement agreement after the parties acknowledged that they could not agree upon a standard. In so doing, the district court explicitly set forth what amounted to the assumption underlying all post-*Rennie* decisions: “The [Supreme] Court’s action in vacating and remanding the *Rennie* decision for

Only in *Walters v. Western State Hospital*<sup>184</sup> did a federal court begin to retreat from the *Youngberg* standard. In the context of a damages action, the court examined the scope of the right to refuse and addressed the defendants' contention that they were shielded from liability pursuant to the qualified immunity defense. The court first noted that case law granted patients the right to refuse drugs except in emergency situations.<sup>185</sup> The defendants did not directly dispute that an emergency standard governed the scope of the plaintiff's right to refuse. Rather, they asserted that they were immune from suit because their decision to administer medication was the product of professional judgment. In denying the defendants' motion for summary judgment, the court failed to detail what standards governed the right to refuse. First, in adopting an approach similar to that set forth by the Third Circuit in *Rennie V*, the court in *Walters* concluded that disputed issues of fact existed concerning whether a reasonable person exercising professional judgment would have believed that an emergency existed.<sup>186</sup> The court also held that there was a question of fact whether the decision to forcibly administer medication was consistent with the exercise of professional judgment.<sup>187</sup> The court left to readers the unenviable task of determining whether the court believed that the *Youngberg* standard controlled or if relying upon the professional judgment standard when examining qualified immunity was simply a way to determine whether a reasonable defendant could have acted in the same manner as the defendant.

More recently, in *Noble v. Schmitt*,<sup>188</sup> the court addressed a civilly committed

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further consideration in light of *Youngberg*, moreover, evidences an intent to apply the guidelines of *Youngberg* to the right of an involuntarily committed *mentally ill* patient to refuse *administration of psychotropic drugs*." *Id.* at 1321 (emphasis in original). As such, the court's decree authorized the forcible administration of medication after patients were afforded a two tier medical review of any decision to administer medication over objection. *Id.* at 1320, 1322.

*Stensvad v. Reivitz*, 601 F. Supp. 128 (W.D. Wisc. 1985), involved a challenge to a Wisconsin statute that provided that "[f]ollowing a final commitment order, the subject individual does not have the right to refuse medication and treatment except as provided in this section." *Id.* at 129 (quoting Wis. Stats. § 51.61(1)(g) (1985)). While the statute authorized the forcible administration of medication, it provided patients with a right to remain free from unnecessary or excessive medication. The statute also proscribed the use of medication for purposes of punishment or the convenience of staff. *Id.* Although an insanity acquittee challenged the statute, the court recognized that because the state subjected criminal and civil patients to the same statutory provisions, the plaintiff's status had no bearing on the litigation. *Id.* at 130 n.2.

The court first upheld the challenged provisions on the ground that under state law, commitment was for "custody, care and treatment." Hence, involuntary commitment was tantamount to a finding of incompetence in regard to treatment decisions. *Id.* at 130-31.

184. 864 F.2d 695 (10th Cir. 1988).

185. *Id.* at 697-98 (citing, *inter alia*, *In re K.K.B.*, 609 P.2d 747 (Okla. 1980); *Davis v. Hubbard*, 506 F. Supp. 915, 929 (N.D. Ohio 1980)).

186. *Id.* at 699.

187. *Id.*

188. 87 F.3d 157 (6th Cir. 1996).

patient's right to refuse medication in the context of a motion to dismiss a damages claim on qualified immunity grounds. In an unclear opinion, the Court concluded that a state may administer involuntary medical treatment if a patient poses a danger to himself or others or if the treatment is in the patient's medical interest.<sup>189</sup> The court then noted the plaintiff's allegation that an emergency did not initially exist and that the defendant provoked him (plaintiff) to act out so that she could justify forcibly administering medication under the pretext of an emergency. After concluding that if these allegations were true a reasonable defendant would understand that such conduct would be unlawful, the court denied defendant's motion to dismiss.<sup>190</sup>

In a different context, the professional judgment standard was applied when the Fourth Circuit examined the right of an incompetent defendant to refuse medication.<sup>191</sup> In *Charters*, the Fourth Circuit took perhaps the most charitable view of administering medication over objection by holding that such a decision simply constituted a base-line decision that the Constitution permitted a person of the medical professional to make.<sup>192</sup>

In contrast, when evaluating the right of a pretrial detainee to refuse drugs, one court explicitly rejected the applicability of the *Youngberg* standard.<sup>193</sup> The court distinguished *Youngberg* on the grounds that it involved temporary physical restraints as opposed to potentially long-term mental restraints and because the patient in *Youngberg* had been certified severely retarded and unable to care for himself.<sup>194</sup>

### C. The Supreme Court Examines the Issue in Other Contexts

Eight years after *Rennie IV*, in *Washington v. Harper*<sup>195</sup> the Supreme Court examined both the substantive and procedural rights of a prisoner to refuse antipsychotic medication. The Court framed the substantive issue as "what factual circumstances must exist before the State may administer antipsychotic drugs to the prisoner against his will."<sup>196</sup>

Beginning its analysis, the Court noted that state law created a federally

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189. *Id.* at 162 (citing *Washington v. Harper*, 494 U.S. 210, 227 (1990)).

190. *Id.*

191. See *United States v. Charters*, 863 F.2d 302, 313 (4th Cir. 1988) (en banc).

192. *Id.* at 308.

193. See *Bee v. Greaves*, 744 F.2d 1387, 1396 n.7 (10th Cir. 1984).

194. *Id.*; see also *United States v. Watson*, 893 F.2d 970, 980 (8th Cir. 1990) (interpreting *Youngberg* as meaning that the state may forcibly administer antipsychotic medication to prisoner when it becomes necessary to protect the patient and those around him from physical harm).

195. 494 U.S. 210 (1990).

196. *Id.* at 220. In defining a prisoner's substantive right in this fashion, the Court quoted *Rogers III* and reiterated that the substantive contours of an individual's right to refuse "involves a definition of the protected constitutional interest, as well as identification of the conditions under which competing state interests might outweigh it." *Id.* (quoting *Rogers III*, 457 U.S. 291, 299 (1982)) (citations omitted).

protected liberty interest in refusing medication.<sup>197</sup> Because state law expressly prohibited a prison psychiatrist from forcibly administering medication unless the inmate was found to be “(1) mentally ill and (2) gravely disabled or dangerous,” state law created “a justifiable expectation on the part of the inmate that the drugs will not be administered unless those conditions exist.”<sup>198</sup>

The Court also found that the Due Process Clause itself created a liberty interest in avoiding the unwanted administration of antipsychotic medication.<sup>199</sup> However, the Court rejected the prisoner’s contention that the Fourteenth Amendment require a finding of incompetence before a prison doctor can forcibly drug an inmate.<sup>200</sup> Rather, the court determined a prison regulation governing the administration of medication is constitutional if the regulation is “‘reasonably related to legitimate penological interests.’”<sup>201</sup> This standard governed prison regulations “even when the constitutional right claimed to have been infringed is fundamental, and the State under other circumstances would have been required to satisfy a more rigorous standard of review.”<sup>202</sup> The Court then found that by limiting the forcible administration of medication to patients who were mentally ill and either dangerous or gravely disabled, the state law was reasonably related to legitimate penological interests.<sup>203</sup>

Two years after the Court decided *Harper*, it decided *Riggins v. Nevada*.<sup>204</sup> In *Riggins*, a defendant challenged his convictions on the ground that the state subjected him to a regimen of forced medication during his trial that violated his rights under the Sixth and Fourteenth Amendments.<sup>205</sup>

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197. *Id.* at 221.

198. *Id.*

199. *Id.* at 221-22.

200. *Id.* at 222.

201. *Id.* at 223 (quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987)).

202. *Id.* (citing *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987)).

203. *Id.* at 225. In determining the reasonableness of the regulation, the Court examined three factors: (1) whether there was a rational connection between the prison regulation and the legitimate government interest that justified the regulation; (2) the impact that the accommodation of the asserted constitutional right would have upon guards, other inmates and prison resources in general; and (3) the existence of ready alternatives, the absence of which is evidence of the reasonableness of the regulation. *Id.* at 224-25.

In *Harper*, the regulations satisfied the State’s interest in providing needed medical treatment and maintaining prison safety. The regulation in question furthered legitimate State objectives since proper use of antipsychotic medication is one of the most effective means of treating a mental illness that is likely to cause violent behavior. *Id.* at 226. The Court also rejected other possible alternatives, including physical restraints, which the Court noted, provided only short-term relief. Moreover, the Court found that the prisoner failed to demonstrate how physical restraints or seclusion were acceptable substitutes for antipsychotic medication, in terms of either their medical effectiveness or their impact on limited prison resources. *Id.* at 226-27.

204. 504 U.S. 127 (1992).

205. *Id.* at 132-33. Although the petitioner in *Riggins* raised the right to refuse issue in an appeal of his murder conviction, the context in which the issue was raised has little bearing upon

The Court first presumed that the administration of antipsychotic medication (Mellaril) was medically appropriate.<sup>206</sup> It then interpreted *Harper* as requiring not only a determination of medical appropriateness, but also a finding of an overriding justification before a state may forcibly administer medication to a convicted prisoner.<sup>207</sup> By noting that prison regulations are subject to a reasonableness test, which is “less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights,”<sup>208</sup> the Court distinguished the present case of a trial setting from the prison setting in *Harper*.

The Court then held that Nevada would have satisfied substantive due process if the administration of medication was medically appropriate and “considering less intrusive alternatives, essential for the sake of Riggins’ own safety or the safety of others.”<sup>209</sup> Nevada also would have satisfied due process if it established that it could not obtain an adjudication of guilt or innocence by using means less intrusive than an involuntary but medically appropriate regimen of antipsychotic drugs.<sup>210</sup> However, the Supreme Court noted that the trial court failed to make any findings when it denied Riggins’ application to discontinue the medication. As such, the trial court failed to address the necessity of medication to satisfy safety considerations, other compelling state concerns, or the availability of reasonable alternatives.<sup>211</sup> In light of the trial court’s failure to determine the availability of alternatives to antipsychotic drugs and the necessity of such treatment to satisfy compelling state interests, the Supreme Court held that this failure may well have impaired Riggins’ Sixth and Fourteenth Amendment rights.<sup>212</sup>

### III. REEVALUATING THE APPLICABILITY OF THE PROFESSIONAL JUDGMENT STANDARD OF *YOUNGBERG* TO THE REFUSAL OF TREATMENT CONTEXT

The failure of the Supreme Court in *Harper* and *Riggins* to rely upon the professional judgment standard of *Youngberg* as part of constitutional analysis amounts to a clear signal that the professional judgment standard does not

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the impact of *Riggins* on a civil patient’s right to refuse. Just as when an individual seeks damages for, or an injunction to halt an illegal regimen of forced drugging, the Court in *Riggins* addressed whether state conduct violated the Constitution. Although the Court framed the chief issue for review as whether the involuntary administration of antipsychotic medication denied the petitioner a full and fair trial, the Court based its decision on not only cases that addressed the issue of prejudice in a criminal proceeding, but also the circumstances when the state may infringe upon the liberty interests of an individual through the forcible administration of medication. *See id.* at 135.

206. *Id.* at 133.

207. *Id.* at 135.

208. *Id.* (quoting *O’Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987)).

209. *Id.*

210. *Id.*

211. *Id.* at 136.

212. *Id.* at 136-37. The Court reversed the conviction without requiring the defendant to establish actual prejudice as attempts to prove or disprove prejudice would be futile. *Id.* at 137.

necessarily govern a civilly committed individual's right to refuse treatment under the Fourteenth Amendment.<sup>213</sup> However, upon analysis, it might be more accurate to say that *Harper* and *Riggins* simply clarified what should have been clear since the Supreme Court's remand in *Rennie IV*: that application of the professional judgment standard in the refusal of treatment context has always been a dubious proposition at best.

First, when assessing the applicability of the professional judgment standard in the refusal of treatment context, one must attempt to reconcile the Supreme Court's decision in *Rogers III* with its decision to remand *Rennie IV* in light of *Youngberg*. Indeed, it is very surprising that no court has ever questioned why the Supreme Court remanded *Rogers III*, directing the court of appeals to examine the degree to which state law created protectable liberty interests, and then two weeks later apparently adopted a standard far more deferential to clinicians when it remanded *Rennie IV* in light of *Youngberg*.<sup>214</sup> The question requires scrutiny as the Supreme Court decided *Rogers III* the same day it decided *Youngberg* and two weeks later remanded *Rennie IV*. However, the Court did not remand *Rennie IV* in light of *Rogers III*—the other right to refuse case—but rather *Youngberg*, a case with little factual similarity to *Rennie IV*. Unless one believes that the Supreme Court began to question its decision in *Rogers III* within two weeks of the opinion, any decision addressing the right to refuse requires a reconciliation of the different dispositions in *Rogers III* and *Rennie IV*. When one reconciles *Rogers III* and *Rennie IV*, it becomes clear that at the very least, courts should not apply the professional judgment standard until they determine: 1) whether any relevant state law exists to guide the balancing process between the individual and the state; and 2) whether state law creates a liberty interest in refusing medication.<sup>215</sup>

In *Rogers III*, the Court recognized that not only may state law serve as a source of a federally protected liberty interest,<sup>216</sup> a concept that the Supreme Court reiterated in *Harper*,<sup>217</sup> but state law can also serve as a guide in determining how much weight to accord the competing interests of the individual

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213. Admittedly, one can assert that neither *Harper* nor *Riggins* addressed the right of a civil patient as did *Rennie IV*. However, because “[p]ersons who have been involuntarily committed are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish,” *Youngberg v. Romeo*, 457 U.S. 307, 321-22 (1982), it is highly unlikely that the more onerous professional judgment standard governs civilly committed patients’ right to refuse when prisoners and pretrial detainees are not subject to this standard.

214. The Supreme Court decided *Rogers III* on June 18, 1982 and remanded *Rennie IV* in light of *Youngberg* on July 2, 1982.

215. See *Rogers III*, 457 U.S. at 300; see also *Washington v. Harper*, 494 U.S. 210, 221 (1990). For discussion of the impact of state created liberty interests on the right to refuse medication, see *infra* notes 492-514 and accompanying text.

216. *Rogers III*, 457 U.S. at 300.

217. *Harper*, 494 U.S. at 221.

and the state.<sup>218</sup> Because recent state law may have altered the balance between the competing interests,<sup>219</sup> the Court remanded *Rogers III* so that the lower court could assess the impact of new state law.<sup>220</sup> There was no need to examine relevant state law in *Rennie IV* because the Third Circuit had explicitly held that state law did not create any protected liberty interests.<sup>221</sup> Because state law provided that only voluntary patients could refuse medication,

the implication of the statute is that involuntarily committed patients do not have this right and a New Jersey trial court has so held. Research has not disclosed any New Jersey appellate opinions interpreting the statute, nor has the Supreme Court of that state had occasion to determine the application of the New Jersey constitution or the common law in this situation.<sup>222</sup>

Accordingly, in *Rennie IV* there existed no state law to guide a court when it weighed the competing interests of the patient and the state. However, as the Court in *Youngberg* recognized, the balancing of an individual's liberty interest against relevant state interests "cannot be left to the unguided discretion of the judge or jury."<sup>223</sup> When evaluating the rights of patients in New Jersey where there was no state law to guide the balancing process and no independent interest in refusing medication, the Court in *Youngberg*, resorted to a relevant standard under federal law in order to avoid ad hoc balancing. Resort to any such uniform standard, including the *Youngberg* professional judgment test, was both unnecessary and inappropriate in *Rogers III*. The Court recognized that because of the recently decided state law case of *Guardianship of Roe*, relevant state law may have existed and should serve to balance the competing interests of the individual and the State.<sup>224</sup>

Even prior to *Harper*, further support for this analysis existed. The Court in *Rogers III* went so far as to cite *Youngberg* when it noted that substantive due process involved defining protected constitutional interest as well as the conditions under which competing state interests might outweigh it.<sup>225</sup> The Court in *Rogers III* cited *Youngberg* in recognizing that a court should weigh a patient's constitutional interest against the state's competing interest. Yet, the Court also remanded *Rogers III* in light of *Guardianship of Roe*. Therefore, resort to an independent federal standard is appropriate only in the absence of independent state law that (1) creates a protectable interest in refusing medication and (2) serves to guide the balancing of the competing interests of the individual and the

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218. *Rogers III*, 457 U.S. at 304.

219. *Id.*

220. *Id.* at 306.

221. *Rennie III*, 653 F.2d 836, 842 (1980).

222. *Id.* (citing *In re B.*, 383 A.2d 760 (N.J. Super. 1977)).

223. *Youngberg v. Romeo*, 457 U.S. 307, 321 (1982).

224. *Rogers III*, 457 U.S. at 300-04.

225. *Id.* at 299.

state.<sup>226</sup>

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226. See *Rennie*, 653 F.2d at 842. In most jurisdictions, resort to an independent federal standard will not be appropriate because there is state law that limits the forcible administration of medication. See *infra* notes 504-08 and accompanying text.

If the author is correct when asserting that the Supreme Court remanded *Rennie IV* because of the absence of relevant state law, the Third Circuit's reliance upon *In re B.* to conclude that no state created interest existed is particularly ironic because the state court probably decided *In re B.* incorrectly. In *In re B.*, the court examined New Jersey statutory law and noted that state law deemed experimental research, shock treatment, psychosurgery and sterilization intrusive forms of treatment that required the consent of the patient or his guardian. *Id.* at 763. On the other hand, the Legislature failed to delineate medication as intrusive treatment. *Id.* The court then ruled that by implication, the administration of medication did not require the informed consent of a patient and hospital staff could administer medication over objection. *Id.*

However, at the time the court decided *In re B.*, New Jersey law recognized the right of all patients to make informed treatment decisions. See *Kaplan v. Haines*, 232 A.2d 840, 847 (N.J. Super. 1967), *overruled on other grounds* by *Largey v. Rothman*, 540 A.2d 504 (N.J. 1988). Furthermore, state law provided that (1) no patient shall be deprived of any civil right as a result of the receipt of treatment under the state's commitment laws, N.J. STAT. ANN. § 30:4-24.2(a), and (2) all patients, even those involuntarily hospitalized, shall be presumed competent. *Id.* § 30:4-24.2(c). These statutory provisions, together with the common law right to make informed treatment decisions, which included the right to determine one's treatment, see *Kaplan*, 232 A.2d at 840; *Common Law Remedy*, *supra* note 11, at 1743, provided all New Jersey patients with a right to determine one's course of treatment, which necessarily included the right to refuse medication.

An examination of New Jersey law at the time of *In re B.* reveals that the court in *In re B.* incorrectly concluded that because some forms of treatment, but not the administration of medication, required the provision of informed consent, hospital staff could administer medication in the absence of informed consent, i.e., over objection. Admittedly, under New Jersey law, a general provision should yield when it conflicts with a specific statutory provision. *Sheeran v. Nationwide Mut. Ins. Co., Inc.*, 388 A.2d 272, 275 (N.J. Super. 1978). Hence, if the laws pertaining to competence and the forfeiture of civil rights conflicted with laws governing the right to refuse medication, the latter would prevail. However, the legal axiom *expressio unius est exclusio alterius*, (the express mention of one thing implies the exclusion of another) is simply an interpretative aid and not the rule of law. *Gangemi v. Berry*, 134 A.2d 1, 6 (N.J. 1957). Any implication from the mention of some things in a statute and the exclusion of others "must be clear and compelling . . . not a conjectural or purely theoretical concept." *Id.* More importantly, under New Jersey law, any change limiting a patient's common law right to determine his own course of treatment would have had to have been expressly stated. See *State v. Western Union Tel. Co.*, 97 A.2d 480, 489 (N.J. 1953); *Fivehouse v. Passaic Valley Water Comm'n*, 317 A.2d 755, 757 (N.J. Super. 1974); *Township of Wayne v. Ricmin, Inc.*, 308 A.2d 27, 30 (N.J. Super. 1973). Accordingly, the court in *In re B.* should not have read into the statutory scheme in question a right to override a patient's common law right to make informed treatment decisions. There was no express intent to overrule a patient's common law right. Hence, the court could, and should, have interpreted the New Jersey provisions regarding treatment as (1) requiring affirmative consent when hospital staff sought to administer experimental treatment, shock therapy or psychosurgery, while (2) permitting a patient to refuse medication while authorizing hospital staff to administer

Moreover, a recognition that the absence of state law requires resort to a federal standard does not mean that the professional judgment standard is the appropriate standard to govern the right to refuse medication in any instance. Rather, the Supreme Court's remand in *Rennie IV* amounted to a suggestion that the professional judgment standard may be appropriate in the refusal of treatment context.<sup>227</sup> *Youngberg* and *Rogers III* were the first Supreme Court cases

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medication in the absence of an informed decision to accept drugs.

Not only did the court err in deciding *In re B.* in the manner that it did, but the circumstances surrounding the court's opinion, as related by the patient's counsel, are particularly troubling. The issue before the court was whether a patient who was a management problem in the hospital, i.e., posing a danger in the hospital setting, could be medicated over objection. Counsel, to the best of his recollection, is "almost sure" there were no briefs on this issue. Conversation with Donald Smith, respondent's counsel (Sept. 16, 1996). As this was a routine case in the state's mental hygiene court calendar, on the day the matter was on the court calendar the court issued a ruling from the bench that authorized the forcible administration of medication. *Id.* Only a few months later did the court issue, *sua sponte*, a written opinion that was published and which eventually served as authority for the Third Circuit's conclusion that involuntary patients could not refuse medication under state law. *Id.*

Ironically, a California appellate court looking at very similar case law to that which existed in New Jersey at the time of *In re B.*, reached the opposite conclusion and held that state law afforded patients a right to refuse medication. *See Riese v. St. Mary's Hosp. & Med. Ctr.*, 271 Cal. Rptr. 199 (Cal. App. 1st Dist. 1987). California law provided that people with mental illness have the same legal rights as others under both federal and state law and no person may be presumed competent as a result of involuntary treatment for mental illness. *Id.* at 205, 206 (citing CAL. WELF. & INST. CODE §§ 5325.1; 5331 (West 1987)). State law also explicitly guaranteed patients the right to refuse convulsive therapy, i.e., shock treatment and psychosurgery. *Id.* at 207. The treating hospital argued that under *expressio unius est exclusio alterius*, all omissions under the statute should be regarded as exclusions, which would mean that the legislature intended to deny patients the right to refuse antipsychotic drugs. *Riese*, 271 Cal. Rptr. at 207. The court rejected this contention.

Recognizing that the inference embodied in the maxim *inclusio unius est exclusio alterius* is not to be drawn when it frustrates a legislative purpose, the court rejected the hospital's argument. Since state law clearly spelled out that unless specifically set forth, patients retain all their rights, and under common law individuals have the right to withhold their consent to treatment, "[t]he fact that [a statute] expressly authorizes patients to refuse psychosurgery and electroconvulsive treatment does not, as the defendants assert, exclude by implication the patients' rights to make treatment decisions as to antipsychotic drugs." *Id.* at 208 (quoting *Rogers v. Commissioner of Dep't of Mental Health*, 458 N.E.2d 308, 313 (Mass. 1983)).

227. *See Zant v. Moore*, 489 U.S. 836, 837 (1989) (Backmun, J., dissenting) (commenting that vacated and remanded in light of another Supreme Court case does not mean a pre-judgment of the issue a lower court must address on remand); *Busby v. Louisiana*, 474 U.S. 873, 875 (1985) (Marshall, J., dissenting) (commenting that generally, the Supreme Court will vacate and remand when an intervening decision "may" affect a lower court's decision); *see also* Grant H. Morris, *Judging Judgment: Assessing the Competence of Mental Patients to Refuse Treatment*, 32 SAN DIEGO L. REV. 343, 351-352 (1995) (noting Supreme Court's remand of *Rennie IV* in light of

involving the treatment of institutionalized mentally disabled patients. Understandably, the Court believed the *Youngberg* standard might provide some guidance to the lower court addressing the treatment of the institutionalized mentally disabled. However, this does not mean that the Court necessarily believed that *Youngberg* controlled in the refusal of medication context. If the Court did, it is more likely that it would have issued an opinion so holding.<sup>228</sup> The Court's remand in light of *Youngberg* was simply a recognition that the lower court decided the case without the benefit of *Youngberg* and hence it was appropriate to re-consider the issue of the right to refuse in light of the newly decided case.

The unusually deferential professional judgment standard also should not control the right to refuse issue even in the absence of relevant state law because the standard was designed for the unique situation presented in *Youngberg*. The considerations inherent in *Youngberg* do not exist in the refusal of treatment context.<sup>229</sup>

First, the right to treatment raises a distinct analysis under the Due Process Clause not applicable to the right to refuse.<sup>230</sup> The right to treatment, which requires the government to provide an affirmative benefit to institutionalized mentally disabled individuals, is an exception to general constitutional jurisprudence.<sup>231</sup> Generally, the Constitution has been described as a "charter of negative rather than positive liberties."<sup>232</sup> The Due Process Clause declares that

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*Youngberg* constituted a suggestion that professional judgment standard might be a usable standard in right to refuse cases).

228. When the Supreme Court believes that an intervening Supreme Court decision necessarily controlled another case on its docket, the Court decides this second case on the merits, relying on the intervening case as authority. It has not remanded the subsequent case. *See, e.g.*, *Wainwright v. Goode*, 464 U.S. 78, 86 (1983) (reversing court of appeals' decision relying upon' *Barclay v. Florida*, 463 U.S. 939 (1983)).

229. Admittedly, courts have applied the professional judgment standard in numerous other situations. *See generally* Stefan, *supra* note 14, at 699-715. However, Professor Stefan persuasively argues that the adoption of the professional judgment standard in contexts other than the right to treatment is frequently incorrect. *See id.* at 672, 706.

230. *See Youngberg*, 457 U.S. at 315 (framing issues at hand as whether rights to be afforded are "protected substantively by the Due Process Clause").

231. *See Collins v. City of Harker Heights*, 503 U.S. 115, 127 n.10 (1992) ("[h]istorically, this guarantee of due process has been applied to *deliberate* decisions of government officials to *deprive* a person of life, liberty or property") ("deliberate" emphasized in original) ("deprive" emphasized by author).

232. *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983). In characterizing the Constitution in this manner, the Seventh Circuit noted that "[t]he men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much to them. The Fourteenth Amendment, adopted in 1868 at the height of laissez-faire thinking, sought to protect Americans from oppression by state government, not to secure them basic governmental services." *Id.* at 1203. For a discussion of positive and negative rights under the Constitution, see Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271

a state may not “deprive any person of life, liberty or property without due process of law.”<sup>233</sup> However, it “generally does not impose any affirmative ‘duty to provide substantive services.’”<sup>234</sup>

However, when a state restrains the liberty of a mentally disabled person so as to render him incapable of meeting such basic needs as food, clothing, shelter, medical care and reasonable safety, the Fourteenth Amendment imposes a “duty to assume some responsibility for his safety and general well-being.”<sup>235</sup> Such a responsibility exists because the state has limited the person’s ability to act on his own behalf.<sup>236</sup> In other words,

[i]n the substantive due process analysis, it is the State’s affirmative act of restraining the individual’s freedom to act on his own behalf—through incarceration, institutionalization, or other similar restraint of personal liberty—which is the ‘deprivation of liberty’ triggering the protections of the Due Process Clause, not its failure to act to protect his liberty interests against harms inflicted by other means.<sup>237</sup>

This reasoning supports the right to food, clothing, shelter, and safety that was set forth in *Youngberg*. It does not explain why the Constitution imposes an affirmative obligation upon a state already addressing the basic needs of an institutionalized individual to also provide treatment.<sup>238</sup> The Court in *Youngberg*

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(1990); David P. Currie, *Positive and Negative Rights*, 53 U. CHI. L. REV. 864 (1986).

233. U.S. CONST. amend XIV, § 1 (emphasis added).

234. Fialkowski v. Greenwich Home for Children, Inc., 921 F.2d 459, 465 (3d Cir. 1990) (emphasis in original) (quoting *Youngberg*, 457 U.S. at 317).

235. DeShaney v. Winnebago County Department of Social Services, 489 U.S. 198, 200 (1989).

236. *Id.*

237. *Id.*

238. There have been numerous bases put forth to justify a right to treatment for institutionalized mentally disabled individuals. See, e.g., Roy G. Spece, Jr., *Preserving the Right to Treatment: A Critical Assessment and Constructive Development of Constitutional Right to Treatment Theories*, 20 ARIZ. L. REV. 1 (1978) (discussing such legal bases for the right to treatment as the *quid pro quo* theory; a requirement of providing treatment to avoid commitment that is tantamount to punishment; and the least restrictive alternative theory). Perhaps the soundest foundation for the right to treatment rests with *Jackson v. Indiana*, 406 U.S. 715 (1972) and *Jones v. United States*, 463 U.S. 354 (1983). *Jackson* requires the “nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed.” *Jackson*, 406 U.S. at 738. *Jones* established that the protection against harm caused by a mentally disabled person and treatment are both constitutionally acceptable and required purposes of commitment. In *Jones*, which was decided a year after *Youngberg*, the Court held that both civil commitment and confinement following a verdict of not guilty by reason of insanity serve to “treat the individual’s mental illness and protect him and society from his potential dangerousness.” *Jones*, 463 U.S. at 368. Accordingly, an insanity acquittee (and presumably, a civilly committed patient) “is entitled to release when he has recovered his sanity or is no longer dangerous.” *Id.* (emphasis added). Another Supreme Court case affirms the provision of treatment as a constitutional prerequisite for

provided little basis for the right to training,<sup>239</sup> which it held to be among the protected liberty interests of the plaintiff,<sup>240</sup> other than to note that involuntarily committed individuals “are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish.”<sup>241</sup>

Having concluded that the Due Process Clause confers a right to training, the Court addressed two concerns. First, the Court wanted to limit judicial review of day-to-day treatment decisions,<sup>242</sup> particularly interference with institutional operations by the federal judiciary.<sup>243</sup> Presumably this included a concern about excessive federal court intervention arising out of lawsuits for injunctive relief. Such a concern is understandable, considering that the constitutional requirement of a right to treatment means every treatment plan for every involuntarily hospitalized patient raises potential constitutional considerations.

Second, the Court believed that hospital clinicians should not have to make clinical decisions in the shadow of damages actions for wrongful or inappropriate treatment.<sup>244</sup> This concern is also understandable in light of the evolving nature of the qualified immunity defense that was occurring at the time of the Court’s decision in *Youngberg*. At that time, the Court had not yet issued its opinion in *Harlow v. Fitzgerald*<sup>245</sup> modifying the qualified immunity defense from a subjective to an objective standard.<sup>246</sup> To further complicate the issue of damages, the plaintiff in *Youngberg* did not challenge the lower court’s jury

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confinement. *See Foucha v. Louisiana*, 504 U.S. 71 (1992). In *Foucha*, the Court held that a state must release an insanity acquittee if he is no longer mentally ill, notwithstanding any potential harm he may cause. *Id.* at 77-79. Ironically, in *Youngberg*, the majority rejected *Jackson* as a basis for the substantive right to treatment, holding that *Jackson* was a procedural due process case that simply addressed the validity of an involuntary commitment. *Youngberg*, 457 U.S. at 320 n.27.

239. In *Youngberg*, the Supreme Court referred to the provision of treatment as “training” because the subject of the lawsuit was a mentally retarded individual and retardation is a training impairment as opposed to an illness. *Youngberg*, 457 U.S. at 309 n.1. Since *Youngberg*, courts have equated the issue of training of a retarded individual with the provision of treatment to a mentally ill person. *See, e.g.*, *Woe v. Como*, 729 F.2d 96, 104-07 (2d Cir. 1984).

240. *Youngberg*, 457 U.S. at 319.

241. *Id.* at 322. In *Youngberg*, the mentally retarded resident’s representative sought only training related to safety and freedom from restraints and the court limited the right to training to that which was minimally adequate to ensure safety and freedom from restraint. *Id.* at 318-19. Without citing any authority, the Court adopted the concurring opinion of Chief Judge Seitz of the Third Circuit which noted that “the plaintiff has a constitutional right to minimally adequate care and treatment. The existence of a constitutional right to care and treatment is no longer a novel legal proposition.” *Id.* (quoting *Romeo v. Youngberg*, 644 F.2d 147, 176 (3d Cir. 1980) (Seitz, C.J., concurring)).

242. *Id.* at 322-23 & n.29.

243. *See id.* at 322.

244. *Id.* at 324-25.

245. 457 U.S. 800 (1982) (issued a week after *Youngberg*).

246. *Id.* at 815-19.

instructions on the qualified immunity defense that relied upon *Pierson v. Ray*<sup>247</sup> and *Scheuer v. Rhodes*,<sup>248</sup> neither of which would constitute good law in light of *Harlow*.<sup>249</sup> As such, the professional judgment standard can be viewed as a legal standard that, in this period of legal flux, attempted to address a concern that liability should be imposed only on those government defendants whose conduct was not objectively reasonable.<sup>250</sup>

Understanding the Court's concerns about judicial scrutiny of treatment decisions and the imposition of excessive legal obligations upon clinicians helps to explain why the professional judgment standard should not govern the right to refuse. Seen in this light, the professional judgment standard is simply a standard of judicial review when reviewing decisions impacting protected liberty interests historically not under the substantive component of the Due Process Clause, such as the right to receive treatment.<sup>251</sup>

These considerations have little relevance when examining individual decisions to refuse medication with debilitating, and, at times, life threatening consequences. The right to refuse involves scrutiny of deliberate decisions by physicians that interfere with the right of bodily autonomy, a right that has been historically ingrained within this nation's constitutional jurisprudence.<sup>252</sup> Indeed, the Supreme Court has explicitly recognized the constitutional differences between positive and negative rights when it concluded that "[c]onstitutional concerns are greatest. . .when the State attempts to impose its will by the force

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247. 386 U.S. 547 (1967).

248. 416 U.S. 232 (1974).

249. *Youngberg*, 457 U.S. at 313 n.13.

250. Since 1982, the Supreme Court has clearly noted that 42 U.S.C. § 1983 (1994) does not subject government officials to liability unless they have acted in a manner in which no reasonable official would have acted. *See Anderson v. Creighton*, 483 U.S. 635, 641 (1987); *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

251. Indeed, the Supreme Court took pains to "emphasize" that courts must defer to clinical decisions of qualified professionals and added that the professional judgment standard limits "judicial review" of treatment decisions in a manner that facilitates this deference. *Youngberg*, 457 U.S. at 322; *see also* *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985) (stating that the professional judgment standard governs review of decisions of academic professionals since courts must show great respect for the judgment of academic professionals). In this context, the professional judgment standard prohibits government conduct that so exceeds professional standards that it amounts to an arbitrary exercise of governmental power, which the Due Process Clause prohibits. *See Collins v. City of Harker Heights*, 503 U.S. 115, 127 n.10 (1992). For a more detailed discussion of this concept of due process protection, see *infra* notes 302-05 and accompanying text. *See also* *infra* notes 384-86 and accompanying text (concern for excessive judicial intervention justifies a "reasonably related to penological interests" standard of review in prison setting).

252. *See infra* notes 358-60 and accompanying text. For a general discussion of the difference between positive and negative rights and how this difference pertains to the right to refuse medication, see Stefan, *supra* note 14, at 642-43, 670-72.

of law. . . .”<sup>253</sup>

Indeed, if the *Youngberg* standard constitutes a balance between “the liberty of the individual” and ‘the demands of an organized society[,]’<sup>254</sup> then the professional judgment standard is simply unworkable in the refusal of treatment context. No one can seriously dispute that historically, institutions for the mentally disabled have been fraught with abuse.<sup>255</sup> Nor can anyone seriously dispute the need to ensure that the interests and desires of the institution and its employees do not *unfairly* override those of the psychiatric patient. A combination of factors, including the need to ensure the safety of staff and current staffing levels in a hospital, creates enormous incentives for government psychiatrists to prescribe medication.<sup>256</sup> Furthermore, because institutional considerations often drive treatment decisions,<sup>257</sup> not only is there an incentive to prescribe drugs, but also in very high doses. A docile patient who suffers from side effects, such as akinesia, makes life easier for hospital staff, and psychiatrists. Hence, whether on a conscious or unconscious level, there is incentive to err on the side of overmedication or even to overtly overmedicate patients.<sup>258</sup>

The Constitution requires that any decision to medicate satisfy a “medical appropriateness” standard.<sup>259</sup> However, a professional judgment standard that governs the right to refuse not only results in decisions to medicate over objection but permits doctors to administer dosages of medication in excess of those acceptable, even if the treatment would otherwise constitute malpractice.<sup>260</sup> Accordingly, drugs can be used for behavior control as long as the decision to medicate does not constitute a *substantial* departure from accepted practices. The line between medically appropriate treatment and behavior control becomes indecipherable.<sup>261</sup> Because use of the professional judgment standard to assess a decision to forcibly administer medication is neither “objective” nor “manageable,” but rather relies upon subjective appraisals of clinicians, use of such a standard is troubling.<sup>262</sup> Accordingly, while the professional judgment

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253. *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 510 (1989) (quoting *Maher v. Roe*, 432 U.S. 464, 476 (1977)).

254. *Youngberg*, 457 U.S. at 320 (quoting *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

255. *See, e.g.*, Stefan, *supra* note 14, at 663.

256. Gelman, *supra* note 44, at 1228-29.

257. *See Stefan*, *supra* note 14, at 661.

258. As one authority has noted, while most jurisdictions prohibit the use of medication for staff convenience, “the practice of over-medicating patients persists, while other patients, staff, and administrators look the other way.” Brooks, *supra* note 47, at 507.

259. *See Riggins v. Nevada*, 504 U.S. 127, 135 (1992).

260. *See Shaw v. Strackhouse*, 920 F.2d 1135, 1143, 1144-47 (3d Cir. 1990) (recognizing that traditional malpractice does not rise to the level of a professional judgment violation); *Estate of Porter v. Illinois*, 36 F.3d 684, 688 (7th Cir. 1994).

261. *See Brooks*, *supra* note 47, at 347.

262. *See Riggins*, 504 U.S. at 140-41 (Kennedy, J. concurring).

standard might strike the appropriate balance between individual and societal demands in the context of the provision of treatment, the standard is far too deferential to govern the forcible administration of medication because of the institutional abuses that can, and have, resulted from forced medication.<sup>263</sup>

Other significant differences between the situation presented in *Youngberg* and the right to refuse militate against application of the professional judgment standard when addressing the right to refuse medication. In *Youngberg*, in addition to the issue of treatment, the Court addressed the provision of temporary physical restraints as opposed to psychotropic drugs with their potentially short and long-term side effects.<sup>264</sup> Forcing, by injection if necessary, a person to accept mind-altering medication unquestionably implicates a person's right to bodily integrity. However, when an institutionalized person, whose liberty has already been significantly diminished,<sup>265</sup> has been placed in temporary restraint, such action simply amounts to a *de minimis* interference with a person's liberty, particularly when such action was to protect the patient. Indeed, as one authority has pointed out, the Supreme Court in *Youngberg* reserved judgment on whether the professional judgment standard governs the right to refuse, as the Court noted that issues of severe intrusions on individual dignity were not present in the case.<sup>266</sup>

Moreover, there was no question in *Youngberg* that the patient was severely retarded and lacked the capacity to make any treatment decisions.<sup>267</sup> On the other hand, most civilly committed patients remain competent as a matter of law.<sup>268</sup> Simply put, the government has a far greater interest in making treatment decisions for people who lack the capacity to care for themselves than they do for people whose decision-making skills are not so diminished that they are

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263. See, e.g., Stefan, *supra* note 14, at 664-64. The potential for institutional abuse can be illustrated by the statement of Dr. Loren Roth, detailed at *supra* note 37. Another example is the abysmally poor response by the psychiatric profession when it was becoming abundantly clear that antipsychotic medication produced significant harm. Gelman, *supra* note 76, at 1755-56. Furthermore, mental hospitals in New Jersey once considered the administration of medication "voluntary" if a patient acquiesced after staff threatened with force." Gelman, *supra* note 44, at 1228 n.93.

264. See *Youngberg*, 457 U.S. 307, 319-23 (1982); see also *Bee v. Greaves*, 744 F.2d 1387, 1396 n.7 (9th Cir. 1984).

265. See, e.g., *Vitek v. Jones*, 445 U.S. 480, 493 (1980) (commenting that for an ordinary citizen, civil commitment entails a massive curtailment of liberty).

266. Gelman, *supra* note 44, at 1267 n.325 (citing *Youngberg*, 457 U.S. at 313 n.14.)

267. See *Bee*, 744 F.2d at 1396 n.7. Indeed, the court in *Bee v. Greaves* appears to underestimate the magnitude of the disability of the person upon whose behalf the lawsuit was brought. Nicholas Romeo was profoundly retarded (a level of retardation more pronounced than severe retardation) and had the mental capacity of an eighteen month old child and an I.Q. of between eight and ten. *Youngberg*, 457 U.S. at 309.

268. See *infra* note 507 and accompanying text; see also BRAKEL ET AL., *supra* note 4, at 406-09.

incompetent.<sup>269</sup>

In sum, the Supreme Court's remand of *Rennie IV* in light of *Youngberg* did not warrant application of the professional judgment standard in the refusal of treatment context. If the professional judgment standard does not govern the right to refuse medication, then one can begin to scrutinize the scope of Fourteenth Amendment protection by examining the source of any right to refuse, the weight of competing individual and state interests, and the standard of judicial review triggered by a decision to administer medication over objection. *Washington v. Harper*<sup>270</sup> further establishes that constitutional analysis requires an evaluation of whether state law creates constitutionally protected liberty interests that the substantive component of the Fourteenth Amendment protects.

#### IV. THE SCOPE OF SUBSTANTIVE PROTECTION UNDER THE DUE PROCESS CLAUSE

##### *A. The Concept of Fundamental Rights and Other Protectable Liberty*

No provision of the Constitution explicitly protects against the unwanted administration of medication or any other forcible intrusions of the body. However, while the language of the Fourteenth Amendment "appears to focus only on the processes by which life, liberty, or property is taken,"<sup>271</sup> it is well-settled that the Due Process Clause contains a substantive component that protects rights that have no textual support within the Constitution.<sup>272</sup> This substantive component prohibits the government from taking action under certain circumstances regardless of the fairness of the procedures used.<sup>273</sup>

It is equally well-settled that the "liberty" that the Fourteenth Amendment protects "extends beyond freedom from physical restraint."<sup>274</sup> Rather,

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269. See *Rogers v. Commissioner of Dep't of Mental Health*, 458 N.E.2d 308, 313-14 (Mass. 1983) (recognizing that a state's interest in providing necessary treatment overrides a patient's liberty interest in refusing medication only when the patient is legally incompetent to refuse medication); *Rivers v. Katz*, 495 N.E.2d 337, 343 (N.Y. 1986) (agreeing that a state's interest in providing necessary treatment overrides a patient's liberty interest in refusing medication only when the patient is legally incompetent to refuse medication); *see also Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 287 n.12 (1990) (finding decisions made by competent patient and for incompetent patient are "so obviously different"); *cf. also Addington v. Texas*, 441 U.S. 418, 426 (1979) (stating that the "state has a legitimate interest under its *parens patriae* powers in providing care to its citizens who are unable . . . to care for themselves"); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 257 (1972) (finding that the state's *parens patriae* authority evolved from its role as the "general guardian of all infants, idiots, and lunatics") (citation omitted).

270. 494 U.S. 210 (1990).

271. *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986).

272. *Id.*; *Planned Parenthood v. Casey*, 505 U.S. 833, 847-48 (1992).

273. *Washington v. Glucksberg*, 117 S. Ct. 2258, 2267 (1997); *Daniels v. Williams*, 474 U.S. 327, 331 (1986).

274. *Michael H. v. Gerald D.*, 491 U.S. 110, 121 (1985).

it denotes . . . also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness.<sup>275</sup>

Notwithstanding this seemingly broad concept of liberty, the Supreme Court has been reluctant to extend substantive protections of the Due Process Clause.<sup>276</sup>

In determining whether substantive due process protects a particular liberty interest in question, the Supreme Court has two seemingly related, but different standards. The Court will look at whether the liberty sought to be protected is ““implicit in the concept of ordered liberty””<sup>277</sup> or ““deeply rooted in this Nation’s history and tradition.””<sup>278</sup> Put another way, the latter standard examines whether the interest in question is ““so rooted in the traditions and conscience of our people as to be ranked as fundamental.””<sup>279</sup>

However, the historical protection of certain interests will not ensure

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275. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

276. *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992); *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225-26 (1985).

277. *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937)); *see also Glucksberg*, 117 S. Ct. at 2268.

278. *Bowers*, 478 U.S. at 191 (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977); *Glucksberg*, 117 S. Ct. at 2268. In *Moore v. City of East Cleveland*, the Supreme Court invalidated a housing ordinance that prohibited a grandmother from living with two grandchildren. *Moore*, 431 U.S. at 505-06. The Court concluded that the statute in question violated the appellant’s liberty protected by the substantive component of the Due Process Clause because the institution of family is deeply rooted in this Nation’s history and tradition. *Id.* at 503. In *Washington v. Glucksberg*, the Court upheld the State of Washington’s statute that prohibited the causing or aiding of a suicide. *Glucksberg*, 117 S. Ct. at 2275. The Court found that historically, suicide had been, and generally remains, prohibited. Hence, there is no right to physician assisted suicide under the substantive component of the Due Process Clause. *Id.* at 2271, 2275.

279. *Michael H. v. Gerald D.*, 491 U.S. 110, 122 (1985) (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)). Determining whether the ““history and tradition”” standard is a more, less, or equally appropriate test as compared to the ““ordered liberty”” standard to determine the existence of protected liberty has generated a fair amount of discussion. *See, e.g.*, David Crump, *How Do the Courts Really Discover Unenumerated Fundamental Rights? Cataloguing the Methods of Judicial Alchemy*, 19 HARV. J.L. & PUB. POL’Y 795 (1996); Robin L. West, *The Ideal of Liberty: A Comment on Michael H. v. Gerald D.*, 139 U. PA. L. REV. 1373 (1991). However, because the history and tradition test has been adopted by both the liberal, conservative and moderate wings of the Supreme Court (*see, e.g.*, *Glucksberg*, 117 S. Ct. at 2268; *Cruzan v. Director, Missouri Dep’t of Health*, 497 U.S. 261, 305 (1990) (Brennan, J. dissenting); *Bowers*, 478 U.S. at 194; *Michael H.*, 491 U.S. at 123-24), and the right to refuse drugs is based in substantial part on the history and tradition of protecting an individual’s right to refuse unwanted medical care (*see infra* notes 358-63 and accompanying text), this Article will focus on this standard.

substantive due process protection. While history is an important factor in determining whether or not a particular practice is rooted in the concept of ordered liberty, it is not the sole factor. First, *Michael H. v. Gerald D.*<sup>280</sup> establishes that such interests must be intensely personal and rest upon an historic “sanctity.”<sup>281</sup> Furthermore, while history is important, the Supreme Court also considers “the basic values that underlie our society.”<sup>282</sup> Fundamental

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280. 491 U.S. 110 (1985).

281. *Id.* at 123-24. The Court in *Michael H.* never explained what it meant when it concluded that substantive due process protects those interests that rest upon an historic sanctity. *See id.* However, case law indicates that it involves matters relating to the most personal and private aspects of individual and family life. *See Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992); *see also Glucksberg*, 117 S. Ct. at 2271 n.19 (detailing instances in which Supreme Court found substantive due process protection). Hence, although one’s interest in reputation has been historically protected, the Supreme Court distinguished one’s interest in reputation from matters relating to “marriage, procreation, contraception, family relationships, and child rearing and education.” *Paul v. Davis*, 424 U.S. 693, 713 (1976). Substantive due process does not protect an individual’s interest in reputation. *Id.*

However, the Court in *Washington v. Glucksberg* made clear that substantive due process does not protect all important intimate and personal decisions. *Glucksberg*, 117 S. Ct. at 2269. Rather the Nation’s history, legal tradition and practices serve as “guideposts” for the delineating of substantive due process protections. *Id.* at 2268. Hence, it appears that only in rare instances will conduct that has not been historically protected receive substantive due process protection.

282. *Michael H.*, 491 U.S. at 122-123 (quoting *Griswold v. Connecticut*, 381 U.S. 479, 501 (1965) (Harlan, J. concurring)). A respect for basic values explains the decision in *Loving v. Virginia*, 388 U.S. 1 (1967). At one time, 41 states passed anti-miscegenation statutes. *Compassion in Dying v. Washington*, 79 F.3d 790, 806 n.20 (9th Cir. 1996) (citing Harvey M. Appelbaum, *Miscegenation Statutes: A Constitutional and Social Problem*, 53 GEO. L.J. 49, 50 & n.9 (1964)), *rev’d on other grounds*, *Glucksberg*, 117 S. Ct. at 2258. However, by the time *Loving* reached the Supreme Court, the Court had decided *Brown v. Board of Education*, 347 U.S. 483 (1954), which overturned *Plessy v. Ferguson*, 163 U.S. 537 (1896), and ended the constitutional sanctioning of the separation of races through the “separate but equal” doctrine. *See Brown*, 347 U.S. at 495. In addition, Congress has passed numerous civil rights statutes, such as the Civil Rights Act of 1964, 42 U.S.C. §§ 1971, 1975a-1975d, 2000a-2000h-g (1964), all of which evinced a rather significant change in societal attitudes towards the separation of races.

Within history, tradition and societal values, what is implicit within ordered liberty involves “the right to define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.” *Planned Parenthood*, 505 U.S. at 851. While one would have thought that the Court in *Planned Parenthood* recognized that certain intimate decisions were simply beyond the reach of government interference regardless of whether such decisions have been historically and traditionally protected, this is not the case. Rather, the Court has interpreted this language within *Planned Parenthood* as a recognition that substantive due process protects highly personal and intimate decisions as long as such decisions are “deeply rooted in our history and traditions, or . . . fundamental to our concept of constitutionally ordered liberty.” *Glucksberg*, 117 S. Ct. at 2271.

rights deserving of substantive protection are those that relate to “freedom of action in a sphere contended to be ‘private.’”<sup>283</sup> Such “private” rights include marriage, procreation, and family relationships.<sup>284</sup> Bodily integrity<sup>285</sup> is also part of this substantive protection.<sup>286</sup>

A determination of whether a particular type of liberty is deeply rooted in this Nation’s history and tradition requires a definition of the liberty in question. In his now famous footnote six in *Michael H. v. Gerald D.*,<sup>287</sup> Justice Scalia concluded that a court should focus upon “the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified.”<sup>288</sup> On the other hand, Justice Brennan would ask whether the specific interest in question is close enough to any interest previously deemed to be protected by the Fourteenth Amendment as to also be considered an aspect of “liberty.”<sup>289</sup>

Justices O’Connor and Kennedy joined all but footnote six of Justice Scalia’s

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283. *Paul*, 424 U.S. at 713. In this way, unlike anti-abortion, anti-miscegenation and compulsory education laws, any harm to one’s reputation does not compartmentalize lives into highly confined institutional layers. *See* Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 784 (1989). Put another way, maintaining one’s reputation does not impact on the core decisions bearing on how one chooses to live his or her life.

284. *Roe v. Wade*, 410 U.S. 113, 152-53 (1973).

285. “Bodily integrity” involves the right to control one’s body, i.e., the physical aspect of one’s person. *Planned Parenthood*, 505 U.S. at 915-16 (Stevens, J., concurring in part, dissenting in part).

286. *Glucksberg*, 117 S. Ct. at 2267; *Albright v. Oliver*, 510 U.S. 266, 272 (1994). Because the Supreme Court has been willing to recognize substantive due process protections in areas not deemed fundamental, *see infra* notes 298-303 and accompanying text, when the Supreme Court has noted that substantive due process protects matters relating to bodily integrity, marriage, procreation and family, as it did in *Albright v. Oliver*, the Court was not setting forth an inclusive list of those aspects of liberty that substantive due process protects. Rather, the Court was delineating those fundamental rights that deserve the highest protection.

287. *Michael H.*, 491 U.S. at 127 n.6. This footnote has generated much heated debate. *See generally* Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990); West, *supra* note 279; L. Benjamin Young, Jr., *Justice Scalia’s History and Tradition: The Chief Nightmare in Professor Tribe’s Anxiety Closet*, 78 VA. L. REV. 581 (1992). Tribe and Dorf have noted that footnote six “seems destined to take its place alongside Justice Stone’s famous footnote [four] as one of constitutional laws most provocative asides.” *Id.* at 622 n.20 (quoting LAURENCE H. TRIBE AND & MICHAEL C. DORF, *ON READING THE CONSTITUTION* 97-98 (1991)).

288. *Michael H.*, 491 U.S. at 127 n.6. Justice Thomas, who joined the Court after the decision in *Michael H.*, subscribes to the same substantive due process analysis as Chief Justice Rehnquist. *See* *Planned Parenthood*, 505 U.S. at 951-55 (Rehnquist, C.J. dissenting). Under this analysis, the substantive component of the Fourteenth Amendment does not protect a parent-child relationship that resulted from an adulterous relationship as historic practices did not treat such a relationship as a protected family unit. *Michael H.*, 491 U.S. at 124.

289. *Michael H.*, 491 U.S. at 142 (Brennan, J., dissenting).

opinion in *Michael H.*, and noted in a concurring opinion that characterizing rights at “the most specific level available” will not necessarily be the single mode of analysis.<sup>290</sup> More significantly, Justices O’Connor and Kennedy have now rejected the Scalia approach to measuring the scope of substantive due process protection. These Justices, together with Justices Souter and Stevens, believe that Justice Scalia’s approach is “inconsistent with our law.”<sup>291</sup> Rather, they apparently adopted, in substantial part, the views of Justice Brennan.<sup>292</sup> The views of Justice O’Connor are particularly important, and Justice Kennedy only slightly less so, because to a significant degree, Justice O’Connor has shaped substantive due process since *Bowers v. Hardwick*.<sup>293</sup>

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290. *Id.* at 132 (O’Connor, J., concurring).

291. *Planned Parenthood*, 505 U.S. at 847. As the Supreme Court itself recognized, if history were the sole guide, the Court would have decided *Loving v. Virginia*, 388 U.S. 1 (1967), differently. *See Planned Parenthood*, 505 U.S. at 847-48. In *Loving*, the Supreme Court found that substantive due process protected interracial marriage even though interracial marriage was illegal in most states in the 19th century. *Loving*, 388 U.S. at 12.

292. Justice Brennan’s concept of protected liberty within the Constitution has been described as “precedential.” West, *supra* note 279, at 1373. As Tribe and Dorf point out, this view rejects societal traditions as the defining mechanism for determining whether liberty is protected by the Due Process Clause and instead requires a court to rationally connect both judicial precedent and the different clauses within the Constitution. TRIBE & DORF, *supra* note 287, at 1065-69. This approach is illustrated by Justice Harlan’s concept of liberty, which he defines as “is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgement.” *Id.* at 1068 (quoting *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting)). This quote was relied upon by Justices O’Connor, Kennedy, and Souter in explaining what liberty entails in their opinion in *Planned Parenthood*. 505 U.S. at 848. Accordingly, these Justices believe that a woman’s right to choose an abortion is an example of both “*Griswold* liberty” while also fitting in within the right to bodily integrity. *Id.* at 857; *see also* *Washington v. Glucksberg*, 117 S. Ct. 2258, 2285 n.11 (1997) (Souter, J., concurring). See *infra* note 353 for a discussion of the liberty in question in *Griswold v. Connecticut*, 381 U.S. 479 (1965).

293. 478 U.S. 186 (1986). Justice O’Connor was in the five-person majority in *Bowers*. *Id.* at 187. She and Justice Kennedy joined all of the plurality opinion of Justice Scalia in *Michael H.* except for footnote six. *Michael H.*, 491 U.S. at 132. Justice O’Connor wrote the Court’s opinion in *Planned Parenthood* that commanded a majority of justices. *See Planned Parenthood*, 505 U.S. at 841-42. Justices O’Connor and Kennedy were part of the five person majority in *Cruzan*, but Justice O’Connor wrote a concurring opinion in which she emphasized that the substantive due process protects the right to refuse life sustaining medical treatment. *See Cruzan v. Director, Missouri Dep’t of Health*, 497 U.S. 261, 287 (1990). Justice O’Connor wrote the opinion in *Riggins v. Nevada*, with which Justice Kennedy concurred in a separate opinion, 504 U.S. 127, 128 (1992), and both Justices were in the majority in *Washington v. Harper*, 494 U.S. 210, 212 (1990).

Reading *Bowers*, *Michael H.*, *Cruzan* and *Planned Parenthood* together suggests that Justice O’Connor believes that any assessment of whether a particular type of liberty is fundamental as to attain substantive due process protection requires an examination of a number of factors that may

As a result of the Supreme Court's reluctance to expand substantive due process protections, lower courts have concluded that substantive due process protects only those rights deemed fundamental.<sup>294</sup> Although in some instances the Supreme Court has found no substantive protection when the liberty interests claimed were not deemed fundamental by the Court,<sup>295</sup> this appears to be an overstatement. If substantive due process protected only fundamental constitutional rights, then the Supreme Court would subject all infringements of protected substantive liberty interests to the same scrutiny as it does the infringement of fundamental rights.<sup>296</sup> However, this is not the case. Rather,

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at times conflict. These include the degree to which the interest has been historically protected, *Michael H.*, 491 U.S. at 123-24, whether there has been societal approval or disapproval of the interest asserted, *Bowers*, 478 U.S. at 192, and, beyond these considerations, the extent that liberty is related to the physical and mental being of a person, *Planned Parenthood*, 505 U.S. at 851; *Cruzan*, 497 U.S. at 287-88.

*Michael H.* illustrates the Court's (including Justice O'Connor's) attempt to reconcile competing substantive due process considerations. The Court first recognized that history and tradition protected the "unitary family." *Michael H.*, 491 U.S. at 123. The Court further recognized that "[i]n some circumstances" the interests of an unwed father may be "comparable to those of the married father." *Id.* at 129 (quoting *Lehr v. Robertson*, 463 U.S. 248, 260 n.16 (1983) (quoting *Caban v. Mohammed*, 441 U.S. 380, 397 (1979) (Stewart, J., dissenting))). However, societal traditions place limits on the rights of an unwed father in this case in which the mother was cohabitating with, and married to, another man. *Id.* Hence, while substantive due process generally "places limits on a State's right to interfere with a person's most basic decisions about family and parenthood," *Planned Parenthood*, 505 U.S. at 849, under the facts of *Michael H.*, substantive due process did not require the state to permit the unwed father to rebut a presumption of parenthood by the paternal father. *Michael H.*, 491 U.S. at 129-30.

Hence, *Michael H.* can be viewed not so much as a dispute between the state and the natural father as it is the Court's attempt to reconcile competing constitutional considerations since the conferring of rights upon the natural father would have resulted in the loss of rights by the paternal father and impacted upon his liberty interest in parenthood and family. *Id.* at 126. Indeed, a different holding may occur in the situation when the marital parents did not wish to raise the child as their own. *Id.* at 130 n.7.

Admittedly it is difficult to reconcile Justice O'Connor's willingness to join the majority in *Bowers* with her opinion in *Planned Parenthood*. Perhaps because of the pervasive imposition of criminal penalties for sodomy, *see Bowers*, 478 U.S. at 193-94, on the "rational continuum" that Justice O'Connor recognizes governs substantive due process analysis, *see supra* note 292, homosexual activity falls closer to "adultery, incest, and other sexual crimes," *Bowers*, 478 U.S. at 196, than it does to family, marriage, or procreation. *See id.* at 191.

294. *See, e.g.*, *Wooten v. Campbell*, 49 F.3d 696, 699 (11th Cir. 1995); *National Paint & Coatings Ass'n v. City of Chicago*, 45 F.3d 1124, 1129 (7th Cir. 1995); *Wright v. Lovin*, 32 F.3d 538, 540 (11th Cir. 1994); *Local 342, Long Island Pub. Serv. Employees v. Town Board*, 31 F.3d 1191, 1196 (2d Cir. 1994).

295. *See Bowers*, 478 U.S. at 192-94; *Michael H.*, 491 U.S. at 122-27.

296. In order to justify an infringement of a fundamental right, the state must demonstrate a compelling governmental interest. *See, e.g.*, *Simon & Schuster, Inc. v. Members of the New York*

while the Supreme Court has recognized that substantive due process protects interests that fall within a certain private sphere that make them fundamental,<sup>297</sup> the Court has also, at least implicitly, recognized that substantive due process protects certain liberty interests, without concluding that such interests are fundamental.<sup>298</sup> In these instances, the Court has failed to scrutinize the abridgement of protected liberty in the manner that it does fundamental rights.<sup>299</sup>

A number of explanations exist for the Supreme Court's willingness to recognize that substantive due process protects some liberty interests without a concomitant determination that such interests are fundamental. First, there are aspects of liberty, such as a desire to pursue career opportunities or to wear one's hair at a particular length, that simply do not fall within a private realm because they do not involve "a substantial claim of infringement on the individual's freedom of choice with respect to certain basic matters of procreation, marriage, and family life."<sup>300</sup> In other words, some government action does not unduly burden an interest that rests on an historic sanctity or involves an intrusion on the innermost being of the person.<sup>301</sup> Perhaps because these cases involved only qualified abridgement of liberty interests since those aggrieved sought inclusion

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State Crime Victims Bd., 502 U.S. 105, 118 (1991); *Roe v. Wade*, 410 U.S. 113, 155 (1973); *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969). Any state or local government action must be narrowly tailored to further only the compelling interest in question. *See, e.g.*, *Washington v. Glucksberg*, 117 S. Ct. 2258, 2268 (1997); *Reno v. Flores*, 507 U.S. 292, 302 (1993); *Simon & Schuster*, 502 U.S. at 118; *Zablocki v. Redhail*, 434 U.S. 373, 388 (1978). For a discussion of the appropriate standard governing an infringement of the right to refuse, see *infra* notes 380-417 and accompanying text.

297. *See, e.g.*, *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977); *Roe*, 410 U.S. at 152-53.

298. For example, the Supreme Court recognized that a confined mentally ill person's interest in refusing medication is protected by substantive due process without asking whether the right to refuse medication is fundamental. *See Washington v. Harper*, 494 U.S. 210, 221-22 (1990); *Rogers III*, 457 U.S. 291, 299 (1982). Likewise, the Court concluded that mentally ill individuals have a liberty interest in avoiding unwanted hospitalization, and thus that the circumstances in which a state may civilly commit people suffering from mental illness are limited. *See O'Connor v. Donaldson*, 422 U.S. 563, 576 (1975); *see also infra* notes 300-03 and accompanying text.

299. Depending upon the liberty interest involved, the Court has either balanced the competing interests of the individual and the government or applied an arbitrariness standard to governmental action. *See supra* note 298 and *infra* notes 264-70 and accompanying text.

300. *Kelley v. Johnson*, 425 U.S. 238, 244 (1976); *see also Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 225 (1985) (desire for continuation in joint undergraduate-medical school program); *Board of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 91-92 (1978) (desire to continue participation in medical school program).

301. Governmental actions that amount to incidental infringements of liberty do not impermissibly conflict with a persons' liberty. Rather, liberty is violated when state regulations impose an undue burden on the exercise of a right. *See Planned Parenthood v. Casey*, 505 U.S. 833, 874 (1992).

in governmental operated programs,<sup>302</sup> the Supreme Court reviewed these governmental decisions by determining whether such action was arbitrary or capricious.<sup>303</sup>

Second, some of these cases involved rights that may well be fundamental but resolution of the case did not require that determination.<sup>304</sup> Accordingly, at the very least, substantive liberty includes not only protection of fundamental rights through particularly rigorous judicial scrutiny of government conduct, but also a freedom from all substantial arbitrary impositions and purposeless restraints.<sup>305</sup> Notwithstanding the Supreme Court's professed desire to limit the

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302. The individuals in *Board of Curators of University of Missouri v. Horowitz* and *Regents of University of Michigan v. Ewing* sought continued *inclusion* in government operated academic programs that impacted upon the plaintiffs' careers. *See Ewing*, 474 U.S. at 214; *Horowitz*, 435 U.S. at 78. The plaintiff in *Kelley v. Johnson* challenged government rules regulating the appearance of the local police department and not citizens as a whole. *See Kelley*, 425 U.S. at 238. Moreover, these cases involved attempts by individuals to pursue career opportunities in particular government programs for which a limited number of positions were available. Certainly, a government decision that limits one particular career path differs from attempts to limit in full the opportunity to pursue career goals in general. *See, e.g., In re Ruffalo*, 390 U.S. 544, 550 (1968) (recognizing implicitly protected liberty interest in a license to practice law for procedural due process protection).

303. *See Ewing*, 474 U.S. at 225 (federal courts may only examine whether academic decisions constituted a substantial departure from accepted academic norms); *Horowitz*, 435 U.S. at 91-92; *Kelley*, 425 U.S. at 247 (requiring policeman to demonstrate no rational connection between regulation governing length of policeman's hair and promotion of public safety).

304. For example, in *O'Connor v. Donaldson*, 422 U.S. 563 (1975), the Court found that the State cannot involuntarily hospitalize a mentally ill person who is not dangerous to others and who can live safely in the community. *Id.* at 575-76. It may very well be that the right to liberty that is abridged in the civil commitment process is fundamental. *See Cooper v. Oklahoma*, 116 S. Ct. 1373, 1384 (1996) (citing *Addington v. Texas*, 441 U.S. 418 (1979) (setting forth the constitutionally required standard of proof in commitment hearings and addressing "proper protection of *fundamental rights* in circumstances in which the State proposes to take drastic action against an individual") (emphasis added)); *Foucha v. Louisiana*, 504 U.S. 71, 86 (1992) (stating freedom from physical restraint is a fundamental right). It is doubtful the Court would have reached a different result if it expressly held that physical liberty is a fundamental right. *See, e.g., Doremus v. Farrell*, 407 F. Supp. 509, 514 (D. Neb. 1975) (commenting that because of the fundamental rights involved in civil commitment, only the compelling interest of protecting against dangerousness will justify deprivation of liberty); *In re Harry M.*, 468 N.Y.S.2d 359, 363-65 (N.Y. App. Div. 1983) (commenting that the deprivation inherent in civil commitment requires overriding State interest; such overriding interest is protection of harm to self or others). Likewise, as the State in *Harper* could only medicate the prisoner when he posed a danger to himself or others or was gravely disabled, *see Washington v. Harper*, 494 U.S. 210, 221 (1990), the Court would have likely reached the same result if it determined that the right to refuse medication is a fundamental right. *See Riggins v. Nevada*, 504 U.S. 127, 135 (1992) (use of medication to protect against harm to self or others constitutes overriding justification for forced drugging).

305. *See Planned Parenthood*, 505 U.S. at 848-49 (quoting *Poe v. Ullman*, 367 U.S. 497, 543

scope of substantive due process, its willingness to find protected liberty interests in the absence of a determination that such interests are fundamental indicates that the Court may be moving to a more inclusive concept of protectable liberty in which the Court will utilize a continuum approach and balance the liberty interests protected by substantive due process against relevant state interests.<sup>306</sup>

This continuum approach also raises the question of whether the Court will move away from even assessing whether the state has infringed upon a fundamental right and simply determine whether a liberty interest exists and balance such interest against relevant state interests.<sup>307</sup> This question has arisen as a result of the Supreme Court's decision in *Webster v. Reproductive Health Services*,<sup>308</sup> in which Chief Justice Rehnquist noted that a woman's decision to have an abortion was "a liberty interest protected by the Due Process Clause."<sup>309</sup> One year later in *Cruzan v. Director, Missouri Department of Health*,<sup>310</sup> Chief Justice Rehnquist characterized the right to refuse life sustaining support in the form of artificial hydration and nutrition as "more properly analyzed in terms of a Fourteenth Amendment *liberty interest*" than under the constitutional right of privacy.<sup>311</sup>

A significant difference may well exist between a fundamental constitutional right and a liberty interest protected by the substantive component of the Due Process Clause.<sup>312</sup> A liberty interest approach could conceivably make it substantially more difficult for a patient to reject medication under federal law, as "a fundamental rights approach would normally involve strict compelling scrutiny, an exceedingly difficult standard for the government to meet, whereas

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(1961) (Harlan, J. dissenting)). One can argue that in *Ewing*, *Horowitz*, and *Kelley v. Johnson*, the Court was willing to assume the existence of liberty interests because they were not necessary to the resolution of the cases and the Court has never determined that a desire to pursue a particular career choice is protected liberty. *See Collins v. City of Harker Heights*, 503 U.S. 115, 129-30 (1992) (assuming existence of state-created liberty interest and finding that deprivation was not arbitrary). However, the Court's reference in *Planned Parenthood* to limitations on arbitrary governmental conduct strongly suggests that limitations exist on the government's authority to limit a person's choices about how a person wishes to live his life. *Planned Parenthood*, 505 U.S. at 847-49; *see also Washington v. Glucksberg*, 117 S. Ct. 2258, 2271 (1997) (holding that the Constitution requires a prohibition against physician assisted suicide to be rationally related to legitimate government interests even when no fundamental right is involved); *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) ( finding no fundamental right to engage in homosexual behavior, but further declaring that rational basis exists for sodomy criminal statutes).

306. *See* T. Alexander Aleinkoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 970-71 (1987).

307. *See* MARTIN A. SCHWARTZ & JOHN E. KIRKLIN, 1A SECTION 1983 LITIGATION: CLAIMS AND DEFENSES, § 3.7, at 141-42 (3d ed. 1997).

308. 492 U.S. 490 (1989).

309. *Id.* at 520.

310. 497 U.S. 261 (1990).

311. *Id.* at 279 n.7 (emphasis added).

312. SCHWARTZ & KIRKLIN, *supra* note 307, § 3.7 at 141-42.

a liberty interest approach would normally invoke deferential rational basis review, an exceedingly difficult standard for the plaintiff to overcome.”<sup>313</sup> However, upon analysis, it appears that the Supreme Court has not yet rejected a fundamental rights approach and Chief Justice Rehnquist’s opinions in *Webster* and *Cruzan* should not be read as final authority for such a rejection.<sup>314</sup> Rather, the opinions may simply be a recognition that those fundamental rights that fall within a private sphere<sup>315</sup> arise not out of a penumbral right of privacy as suggested in *Griswold v. Connecticut*,<sup>316</sup> but out of the Fourteenth Amendment’s protection of substantive liberty that necessarily requires an evaluation of the competing interests of the individual and the state.<sup>317</sup>

Three years after *Webster*, in *Planned Parenthood v. Casey*,<sup>318</sup> the Supreme Court, in an opinion conspicuously devoid of reference to a right of privacy, nevertheless reaffirmed the fundamental right of a woman to choose an abortion: “The controlling word in the cases before us is ‘liberty.’ . . . [A]ll fundamental rights comprised within the term liberty are protected by the Federal Constitution.”<sup>319</sup> The Court in *Planned Parenthood* made frequent use of the terms “fundamental right,” “right,” “fundamental interest,” “liberty,” and “liberty interest.”<sup>320</sup> This suggests that, notwithstanding the use of various terms, some

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313. *Id.* at 142.

314. Indeed, in *Webster*, when rejecting the trimester approach for delineating relevant state interests, the Court’s analysis rested upon an assumption that abortion is a fundamental right: “The dissenters in *Thornburgh* [v. *American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986)], writing in the context of the *Roe* trimester analysis, would have . . . posit[ed] against the ‘fundamental right’ recognized in *Roe* the State’s ‘compelling interest’ in protecting potential human life throughout pregnancy. ‘[T]he State’s interest, if compelling after viability, is equally compelling before viability.’” *Webster v. Reproductive Health Serv.*, 492 U.S. 490, 519 (1989) (quoting *Thornburgh*, 476 U.S. at 795 (White, J. dissenting)).

315. *Paul v. Davis*, 424 U.S. 693, 713 (1976).

316. 381 U.S. 479, 483-86 (1965).

317. In rejecting the right of privacy as a source of a constitutionally protected interest in refusing life-sustaining treatment, the Court in *Cruzan* recognized that ““whether respondent’s constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests.”” *Cruzan v. Director, Missouri Dep’t of Health*, 497 U.S. 261, 279 (1990) (quoting *Youngberg v. Romeo*, 457 U.S. 307, 321 (1982)). Hence, when referring to substantive liberty as a “liberty interest” in *Webster*, the Court evaluated “the claims of the State to protect the fetus as a form of human life against the claims of a woman to decide for herself whether or not to abort a fetus she was carrying.” *Webster*, 492 U.S. at 520. More significantly, Justices O’Connor and Kennedy were two of the five members of the Court who joined Chief Justice Rehnquist’s opinion in *Cruzan*, 497 U.S. at 263. These two justices comprised part of the plurality opinion in *Planned Parenthood* that made frequent reference to fundamental rights and interests. *Planned Parenthood v. Casey*, 505 U.S. 833, 833 (1992); *see infra* notes 319-20 and accompanying text.

318. 505 U.S. 833 (1992).

319. *Id.* at 846 (emphasis added) (internal citations omitted).

320. The plurality opinion in *Planned Parenthood* made a number of other references to the

rights or interests are fundamental.<sup>321</sup> The scope of the fundamental right is determined by balancing it against relevant state interests.<sup>322</sup>

More recently, the Supreme Court reaffirmed the concept of fundamental rights in *Cooper v. Oklahoma*,<sup>323</sup> in which the Court concluded that a “defendant’s fundamental right to be tried only while competent outweighs the State’s interest in the efficient operation of its criminal justice system.”<sup>324</sup> Significantly, when the Court compared the deprivation of rights from an incompetent defendant with that from a mentally ill person facing civil commitment, the Court noted that “[b]oth cases concern the proper protection of fundamental rights in circumstances in which the State proposes to take drastic action against an individual. The requirement that the grounds for civil commitment be shown by clear and convincing evidence protects the individual’s fundamental interest in liberty.”<sup>325</sup> In *Washington v. Glucksberg*<sup>326</sup> all nine

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right to an abortion. E.g., *Planned Parenthood*, 505 U.S. at 871 (stating, “The woman’s right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*.”). However, the interchangeable use of all of these terms supports Chief Justice Rehnquist’s view that “there is wisdom in not unnecessarily attempting to elaborate the abstract differences between a ‘fundamental right’ . . . , a ‘limited fundamental constitutional right’ . . . or a liberty interest.” *Webster*, 492 U.S. at 520 (citations omitted). The interchangeable use of the terms “fundamental right” and “fundamental interest” can be seen in other instances. See, e.g., *Washington v. Harper*, 494 U.S. 210, 241 (1990) (Stevens, J., dissenting) (characterizing the right to refuse drugs as a “fundamental liberty interest deserving the highest order of protection”); *Moore v. City of East Cleveland*, 431 U.S. 494, 551 (1977) (White, J., dissenting) (strict scrutiny is employed when fundamental interest is involved).

321. See *Glucksberg*, 117 S. Ct. at 2283 n.10 (Souter J. concurring) (stating, “Our cases have used various terms to refer to fundamental liberty interests.”).

322. See *id.* (citations omitted) (commenting that although the Supreme Court has used various terms to refer to fundamental liberty interests, “[p]recision in terminology . . . favors reserving the label ‘right’ for instances in which the individual’s liberty interest actually trumps the government’s countervailing interests; only then does the individual have anything legally enforceable as against the state’s attempt at regulation.”); see also *Rogers III*, 457 U.S. 291, 299 (1982) (citing, *inter alia*, *Roe v. Wade*, 410 U.S. 113 (1973)) (commenting that substantive due process involves identification of constitutional interest and identification of state interests that might outweigh it). Accordingly, the Court’s opinion in *Planned Parenthood* should be read to indicate that after the balancing of individual and government interests, there is a right of a woman to choose an abortion that is a part of liberty and not a right of privacy. See, e.g., *Planned Parenthood*, 505 U.S. at 869 (stating, “[I]t is a constitutional liberty of the woman to have some freedom to terminate her pregnancy.”); *id.* at 873 (stating, “Jurisprudence relating to all liberties save perhaps abortion has recognized [that] not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right”); *id.* at 876 (stating, “The undue burden standard is the appropriate means of reconciling the State’s interest with the woman’s constitutionally protected liberty.”).

323. 116 S. Ct. 1373 (1996).

324. *Id.* at 1383.

325. *Id.* at 1384 (emphasis added). The Supreme Court’s reference to the right of a person

members of the Court concluded that the Due Process Clause "provides heightened protection against government interference with certain fundamental rights and liberty interests."<sup>327</sup>

As a result of the Supreme Court's continued reference to fundamental rights and interests, Chief Justice Rehnquist's opinions in *Webster* and *Cruzan* can be seen not as a repudiation of the concept of fundamental rights, but as a clarification that substantive liberty within the Fourteenth Amendment gives rise to fundamental personal rights, and such rights do not arise from a right of privacy. Indeed, while rejecting the concept of a right of privacy, Chief Justice Rehnquist has recognized the existence of fundamental rights in the areas of personal or family privacy and autonomy.<sup>328</sup>

Accordingly, these opinions appear to forestall rejection of the fundamental rights approach in constitutional analysis. Rather, substantive due process analysis establishes that there is a hierarchy of constitutional protection depending upon the interest asserted and the context in which it is asserted. First, the continued reference to the concept of fundamental interests and rights, particularly in *Planned Parenthood* and *Glucksberg*, indicates that the Court is willing to determine whether a given interest fits within the category of rights traditionally deemed fundamental under either the "ordered liberty" or "history and tradition" standards. These rights include decisions about family and

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to remain free from civil commitment as a fundamental right and fundamental interest in succeeding sentences gives credence to Chief Justice Rehnquist's caveat that one should not attempt to distinguish between fundamental rights and interests. *See supra* note 320. Admittedly, *Cooper v Oklahoma* was as much a procedural due process case as it was a substantive due process case, as it addressed the issue of whether a state could presume a defendant competent and require him to prove that he was competent to stand trial by clear and convincing evidence. *Cooper*, 116 S. Ct. at 1377. However, in addressing this question, the Court applied the same test that it would have in a substantive due process case: whether the state evidentiary rules offend a principle of justice "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Id.* (internal quotations omitted). The Supreme Court's examination of historical practices in *Cooper v Oklahoma* to determine whether a procedural right is fundamental and hence subject to detailed scrutiny illustrates the Court's willingness to recognize the interrelationship between substantive and procedural due process analysis. *See id.*; *see also* M.L.B. v. S.L.J., 117 S. Ct. 555, 563 n.6 (1996) (relying on substantive due process cases relating to family matters to find need for heightened procedural protection in a parental rights termination proceeding).

326. 117 S. Ct. 2258 (1997).

327. *Id.* at 2267.

328. *Id.*; *Planned Parenthood*, 505 U.S. at 951 (Rehnquist, C.J., concurring and dissenting). In the same vein, when the Court in *Cruzan* stated that a right to refuse treatment is more properly analyzed in terms of a Fourteenth Amendment liberty interest than the right of privacy, the Court cited only *Bowers v. Hardwick* a case whose decision rested on whether the protected activity was fundamental. *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 279 n.7 (1990); *see Bowers v. Hardwick*, 478 U.S. 186, 191-94 (1986). This further indicates that Chief Justice Rehnquist does not believe that a court should forego analysis of whether an interest asserted is fundamental.

parenthood, as well as bodily integrity.<sup>329</sup> Second, Supreme Court decisions in such cases as *O'Connor v. Donaldson*<sup>330</sup> and *Washington v. Harper*,<sup>331</sup> together with such decisions as *Kelley v. Johnson*<sup>332</sup> and *Board of Curators of University of Missouri v. Horowitz*,<sup>333</sup> reflect the willingness of the Supreme Court to protect liberty that does not necessarily satisfy the "ordered liberty" or "history and tradition" standards as long as the liberty in question is part of a person's orderly pursuit of happiness.<sup>334</sup> An abridgement of these rights requires either a balancing of competing individual and state interests or a utilization of an arbitrary and capricious standard. Use of either standard depends upon the magnitude of the liberty interest asserted and the context in which it is infringed.<sup>335</sup>

The last class of substantive rights belongs to individuals whom the state has deprived of liberty through incarceration, institutionalization, or other similar restraint.<sup>336</sup> The substantive component of the Due Process Clause protects this class of individuals because "when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being."<sup>337</sup>

On one level, the distinction between fundamental rights and liberty interests may not be particularly significant. Either approach requires a balancing of rights that places the scope of an individual's right to refuse medication at the mercy of the subjective values of judges who are evaluating the right. One judge's overriding justification, or compelling interest, that will support an

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329. See *Planned Parenthood*, 505 U.S. at 849.

330. 422 U.S. 563 (1975).

331. 494 U.S. 210 (1990).

332. 425 U.S. 238 (1976).

333. 435 U.S. 78 (1978).

334. See *supra* note 275 and accompanying text.

335. See *supra* notes 302-04 and accompanying text.

336. *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 200 (1989). In both *Board of Curators of University of Missouri v. Horowitz*, 435 U.S. 78, 91-92 (1978) and *Regents of the University of Michigan v. Ewing*, 474 U.S. 214, 223 (1985), the Court assumed that substantive due process protected individuals from arbitrary state action in the university setting. Even if the Court were to eventually so hold, and there is substantial question as to whether it would, see *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992), any such protection would be no greater than that afforded to those individuals whose substantive due process rights arise out of their confinement. See *Ewing*, 474 U.S. at 225 (subjecting any academic decisions to the professional judgment standard of *Youngberg v. Romeo*, 457 U.S. 307, 323 (1982)).

337. *DeShaney*, 489 U.S. at 199-200. Since the Supreme Court in *Youngberg* first recognized this substantive due process protection, little question exists that government action that abridges these liberty interests of incarcerated individuals will be subject to far less scrutiny than those rights traditionally deemed fundamental. Compare *Youngberg*, 457 U.S. at 317, 323 (finding the state retains considerable discretion in determining scope of responsibilities to provide protection from harm and treatment), with *Roe v. Wade*, 410 U.S. 113, 155 (1973) (compelling state interest necessary when government seeks to override a fundamental right).

infringement on a fundamental right is another judge's significant interest that justifies overriding an important liberty interest.<sup>338</sup> In either case, one can expect that since the well-entrenched right to bodily autonomy serves as a basis for the liberty interest out of which the right to refuse medication arises, the government will have a heavy burden when attempting to justify any infringement on the right to refuse.

However, on a different level, whether or not the right to refuse medication is fundamental has one significant implication. Not only must the state set forth a compelling state interest in order to justify the infringement of a fundamental right, but any limitation must be narrowly tailored to further only those compelling government interests.<sup>339</sup> Such requirement serves as the basis for the "least restrictive alternative" doctrine, a rule of law that serves as a further limitation upon the government's authority to administer medication over objection.<sup>340</sup>

Little question exists that patients retain a liberty interest in refusing medication that requires some substantive due process protection.<sup>341</sup> Part V.B will establish that the right to refuse fits within the category of fundamental rights which affords individuals who wish to refuse medication the broadest constitutional protection.

### *B. The Fundamental Nature of the Right to Refuse*

A determination of whether the right to refuse is fundamental requires analysis of whether the right to refuse satisfies either the "history and tradition"

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338. Indeed, the Court has not been exacting in terms of the magnitude of state interests needed to justify an abridgement of a fundamental right. *Compare Roe*, 410 U.S. at 155 (compelling state interest needed), *with Zablocki v. Redhail*, 434 U.S. 374, 388 (1978) (only sufficiently important state interest can support interference with fundamental right); *see also Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (intrusions on family living arrangements requires careful examination of governmental interests); *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (overriding purpose needed to justify racial classification). The Supreme Court has taken pains to indicate that application of the requirement of a compelling government interest does not forbode a particular result but instead requires a court to engage in careful balancing. *See Adarand Constructors, Inc. v. Pena*, 115 S. Ct. 2097, 2117 (1995) ("we wish to dispel the notion that strict scrutiny is strict in theory, but fatal in fact") (internal quotations omitted). In the refusal of treatment context, the significance of the state interest needed to override a patient's decision to refuse is further lessened because the Supreme Court has strongly suggested that state law should guide the balancing process of individual and state interests. *See Rogers III*, 457 U.S. 291, 304 (1982). For a further discussion in the balancing of interests in the refusal of treatment context, see *infra* notes 418-70 and accompanying text.

339. *See, e.g., Zablocki*, 434 U.S. at 388; *Washington v. Glucksberg*, 117 S. Ct. 2258, 2268 (1997); *Reno v. Flores*, 507 U.S. 292, 302 (1993).

340. *See infra* notes 471-80 and accompanying text.

341. *See Rogers III*, 457 U.S. at 299 & n.16; *Washington v. Harper*, 494 U.S. 210, 221 (1992).

or “ordered liberty” tests.<sup>342</sup> Such an evaluation requires a definition of the right. The Supreme Court has framed the issue of whether, and to what extent, an “involuntarily committed mental patient has a constitutional right to refuse treatment with antipsychotic drugs.”<sup>343</sup> Supreme Court case law establishes that it is not important that the class seeking to exercise this right is comprised of institutionalized mentally ill people.

First, in an analogous context, the Supreme Court has never concluded that a right is less fundamental than it would ordinarily be merely because a prisoner, as opposed to an ordinary citizen, sought to exercise it.<sup>344</sup> Rather, the Court simply subjects an abridgement of a prisoner’s fundamental right to a different standard of review than it would apply if an ordinary citizen were to suffer such an abridgement.<sup>345</sup>

Furthermore, even if one subscribes to the methodology of Justice Scalia in determining the characterization of the right in question, which the majority of the Court apparently does not,<sup>346</sup> the result is the same. There is simply no historical tradition either protecting or denying the right of psychiatrically hospitalized patients to refuse drugs.<sup>347</sup> Moving to what might constitute the next

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342. *See supra* notes 277-79 and accompanying text.

343. *Rogers III*, 457 U.S. at 298-99; *see also Harper*, 494 U.S. at 221 (characterizing the interest as a prisoner’s interest in refusing unwanted administration of antipsychotic drugs).

344. *See, e.g.*, *Turner v. Safley*, 482 U.S. 78, 95 (1987) (recognizing prisoner’s fundamental right to marry).

345. *See Harper*, 494 U.S. at 223 (stating that the Supreme Court will apply a “reasonably related to penological interests” standard “even when the constitutional right claimed to have been infringed is fundamental, and the State under other circumstances would have been required to satisfy a more rigorous standard of review.”). Indeed, it is telling that when, in *Planned Parenthood*, the Court set forth the proposition that marriage is a fundamental right even though it is not mentioned in the Constitution, the Court cited with approval *Turner*, 482 U.S. at 94-99. *Planned Parenthood v. Casey*, 505 U.S. 833, 848 (1992). Part IV.C will address the proper standard of review to govern a psychiatric patient’s decision to refuse drugs.

346. *See supra* notes 290-92 and accompanying text.

347. Courts first addressed the right to refuse drugs in the early 1970’s. *See Brooks*, *supra* note 47, at 341 & n.3 (citing *Winters v. Miller*, 446 F.2d 65 (2d Cir. 1971); *In re B.*, 383 A.2d 760 (N.J. Super. Ct. Law Div. 1977)). This is not surprising since antipsychotic medication was not produced until the 1950’s. *See PERLIN*, *supra* note 29, § 5.02, at 218. Indeed, research details that the provision of antipsychotic medication was first challenged in *Cox v. Hecker*, 218 F. Supp. 749 (E.D. Pa. 1963). In *Cox*, the court granted judgment to state hospital officials in a malpractice claim on the ground that the plaintiff failed to establish through expert testimony that the administration of Thorazine was improper. *Id.* at 753.

Similarly, state statutes addressing the treatment rights of patients are of relatively recent origin. *See, e.g.*, ALA. CODE § 22-8-1 (1984) (delineating the right to refuse treatment, first passed in 1971); ARK. CODE ANN. § 20-47-218(B)(4) (Michie 1997) (treatment statute passed in 1989); CONN. GEN. STAT. ANN. § 17a-543(b) (Michie 1997) (right to refuse treatment statute evolved from 1958 statute); IOWA CODE § 229.23(2) (1997) (treatment statute first passed in 1962). Both the absence of case and statutory law can be contrasted with the prevalence of laws prohibiting abortion

level of tradition, there is also no tradition protecting or denying the right of psychiatric patients to refuse any sort of treatment or to make informed treatment decisions.<sup>348</sup> Hence, one must move to the next level of generality which appears to be the rights of individuals in general to refuse unwanted treatment modalities.<sup>349</sup> Accordingly one must determine whether the aspect of liberty that a psychiatric patient wishes to exercise, namely, a desire to refuse drugs and medical treatment, fits within an aspect of liberty that the Supreme Court has deemed fundamental.<sup>350</sup>

The Supreme Court is willing to equate one's interest in refusing antipsychotic medication with the right to bodily integrity, which carries with it a limitation on the government's authority to compel medical treatment. In *Planned Parenthood v. Casey*,<sup>351</sup> the Court recognized that *Roe v. Wade*<sup>352</sup> could be viewed not only as upholding the concept of liberty in a general sense, which the Court referred to as "*Griswold* liberty,"<sup>353</sup> but also as "a rule (whether or not

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and sodomy that existed in the 19th century. See *Planned Parenthood v. Casey*, 505 U.S. 833, 952 (1992) (Rehnquist, C.J., dissenting); *Bowers v. Hardwick*, 478 U.S. 186, 192-93 (1986).

348. An examination of West's American Digest, which chronicles cases from 1658 until 1896, and the First Decennial through the Seventh Decennial, reveals that until the 1970's *Cox v. Hecker* was the only case to challenge the provision of treatment. See *Cox*, 218 F. Supp. at 749. In the 1970's, courts began to address the right to refuse unwanted treatment modalities on a sporadic basis. See *Stowers v. Wolodzko*, 191 N.W.2d 355, 362, 365 (Mich. 1971) (finding that forced treatment not authorized by law constituted an assault and battery); *New York City Health & Hosps. Corp. v. Stein*, 70 Misc. 2d 944, 947 (N.Y. Sup. Ct. 1972) (recognizing right of competent patient to refuse electroshock treatment); *Kaimowitz v. Michigan Dep't of Mental Health*, unpublished (reprinted in ALEXANDER D. BROOKS, *LAW PSYCHIATRY AND THE MENTAL HEALTH SYSTEM* 902 (1974) (prohibiting psychosurgery, i.e., lobotomy); *Price v. Sheppard*, 239 N.W.2d 905, 910-912 (Minn. 1976) (setting forth limits on the state's efforts to administer electroshock therapy); *Aden v. Younger*, 129 Cal. Rptr. 535, 548-549 (Cal. App. 1976) (recognizing right of competent patients to refuse electroconvulsive therapy). These limited cases cannot be said to constitute an historical tradition protecting the right of psychiatric patients to bodily autonomy.

349. One can assert that this is not the correct level and one should focus on how society traditionally addressed the issue of compulsory treatment in the form of civil commitment. However, framing the level of generality in this manner fails to take into account the significant difference between commitment and the provision of unwanted treatment, namely, the physical invasion on one's body that society has historically protected. See *infra* notes 359-63 and 373-76 accompanying text. If nothing else, the difficulty in determining what constitutes the appropriate levels of generality illustrates the difficulty in applying the methodology of Justice Scalia. See *TRIBE & DORF, supra* note 287, at 1090-91.

350. See *Albright v. Oliver*, 510 U.S. 266, 272 (1994); *Washington v. Glucksberg*, 117 S. Ct. 2258, 2267 (1997).

351. 505 U.S. 833 (1992).

352. 410 U.S. 113 (1973).

353. In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Court recognized that a right to use contraceptives fell within a zone of privacy that the Constitution protected. *Id.* at 484-86.

mistaken) of personal autonomy and bodily integrity, with doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection.<sup>354</sup> In support of this interpretation of *Roe*, the Court cited, *inter alia*, its most recent refusal of medication cases, *Riggins v. Nevada*,<sup>355</sup> and *Washington v. Harper*.<sup>356</sup> Significantly, the Court concluded that whether one views the right to abortion as emanating from *Griswold* liberty or the right to bodily integrity, which permits a person to refuse unwanted medical treatment, the result is the same.<sup>357</sup>

Furthermore, the right to make significant decisions about one's body is rooted in the history and traditions of the American people.<sup>358</sup> As far back as 1891, the Supreme Court recognized the significant nature of this right in *Union Pacific Railway Co. v. Botsford*<sup>359</sup>: "No right is held more sacred, or is more carefully guarded by the common law, than the right of every individual to the possession and control of his own person."<sup>360</sup> The Supreme Court has recognized that the concept of bodily integrity in *Botsford* served as a framework for the informed consent doctrine: "Every human being of adult years and sound mind has a right to determine what shall be done with his own body."<sup>361</sup> Significantly in *Cruzan v. Director, Missouri Department of Health*,<sup>362</sup> the Court recognized that the doctrine of informed consent embodies the right to refuse medication: "The logical corollary of the doctrine of informed consent is that the patient

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354. *Planned Parenthood*, 505 U.S. at 857.

355. 504 U.S. 127 (1992).

356. *Id.* (citing *Riggins*, 504 U.S. at 135; *Washington v. Harper*, 494 U.S. 210 (1990)).

357. *Id.*; *see also Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 287 (1990) (O'Connor, J., concurring) (stating the "Court has often deemed state incursions into the body repugnant to the interests protected by the Due Process Clause").

358. *See Michael H. v. Gerald D.*, 491 U.S. 100, 122 (1989); *Bowers v. Hardwick*, 478 U.S. 186, 191-92 (1986).

359. 141 U.S. 250 (1891).

360. *Id.* at 251. *Botsford* involved an attempt by a defendant in a civil action to require the plaintiff to submit to a surgical examination to determine the scope of her injury. The Supreme Court interpreted a federal statute governing trials in federal courts. *Id.* at 256. However, this does not weaken *Botsford* as indicia of the historical protection of the common law protection of bodily autonomy. Its pertinence to constitutional analysis lies in its recognition of the historical protection of a person's right to control her body.

361. *Cruzan*, 497 U.S. at 269 (quoting *Schloendorff v. Society of New York Hosp.*, 211 N.Y. 125, 129-30 (1914)); *see also Pratt v. Davis*, 118 Ill. App. 161, 166 (1905) (stating, "under a free government at least, the free citizen's first and greatest right, which underlies all others—the right to the inviolability of his person, in other words, his right to himself—is the subject of universal acquiescence, and this right necessarily forbids a physician or surgeon, however skillful or eminent . . . to violate without permission the bodily integrity of his patient by major or capital operation"). For further discussion of the common law as a source of protection for patients who wish to refuse drugs, see generally *Common Law Remedy*, *supra* note 11.

362. 497 U.S. 261 (1990).

generally possesses the right not to consent, that is, to refuse treatment.<sup>363</sup> The Supreme Court's opinion in *Riggins v. Nevada*,<sup>364</sup> further suggests that the Court considers the right to refuse medication as fundamental. First, the Court equated the right of a pretrial detainee to refuse drugs with other "infringements of fundamental constitutional rights."<sup>365</sup> Second, the Court concluded that the trial court erred when it authorized the forced drugging of a criminal defendant because it failed to consider whether or not the medication, in light of less intrusive alternatives, was essential for the safety of the defendant or to others.<sup>366</sup> Finally, the Court interpreted *Washington v. Harper*<sup>367</sup> as requiring findings of an "overriding justification" and medical appropriateness as the accepted rationale for administering medication over objection to a prisoner.<sup>368</sup> The Court recognized that the state court failed to find that safety considerations or "other compelling concerns" outweighed Riggins' interest in freedom from unwanted antipsychotic drugs.<sup>369</sup> Requiring both an overriding justification for governmental conduct and an assessment of whether less intrusive alternatives existed, the Court's analysis is consistent with its own approach for examining actions that unduly burden a fundamental right.<sup>370</sup>

Because of their adoption of the highly deferential professional judgment standard, it is not surprising that courts that have addressed the right of a civil patient to refuse medication under the Federal Constitution after the Supreme Court's remand of *Rennie IV* have failed to examine whether the right to refuse medication is fundamental.<sup>371</sup> However, prior to the Supreme Court's remand of

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363. *Id.* at 270.

364. 504 U.S. 127 (1992).

365. *Id.* at 135 (quoting *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 349 (1987)).

366. *Id.*

367. 494 U.S. 210 (1992).

368. *Riggins*, 504 U.S. at 135.

369. *Id.* at 136.

370. See, e.g., *Zablocki v. Redhail*, 434 U.S. 374, 388 (1977); *Roe v. Wade*, 410 U.S. 113, 155 (1973). Admittedly, while the dissent in *Riggins* noted that the majority's analysis amounted to an application of the strict scrutiny standard, *Riggins*, 504 U.S. at 156 (Thomas, J., dissenting), the majority opinion left resolution of this question for another day as it proclaimed that the majority did not "adopt a standard of strict scrutiny." *Id.* at 136. Rather, the majority concluded the state court violated the defendant's rights because there had been no findings about either the necessity of the medication or the existence of available alternatives. *Id.*

371. See, e.g., *Dautremont v. Broadlands Hosp.*, 827 F.2d 291, 300 (8th Cir. 1987); *Johnson v. Silvers*, 742 F.2d 823, 825 (4th Cir. 1984); *Project Release v. Provost*, 722 F.2d 960, 977-81 (2d Cir. 1983); *Rennie V*, 720 F.2d 266, 268-77 (3d Cir. 1983); *R.A.J. v. Miller*, 590 F. Supp. 1319, 1321-1323 (N.D. Texas 1984). None of the five opinions issue by the *en banc* panel of the Third Circuit in *Rennie V* re-examined the issue of the nature of the right to refuse. However, one can argue that since the plurality opinion and two of the three concurring opinions addressed the issue of less restrictive alternatives, which is required when examining an infringement of a fundamental right, the judges were, at least implicitly, attempting to determine whether the right to refuse is fundamental in nature. It is worth noting that the Third Circuit recognized that *Rennie V* rested on

*Rennie IV*, when courts examined the source of the right to refuse, they either explicitly recognized that the right to refuse is fundamental or implicitly did so by concluding that the right of privacy encompasses the right to refuse.<sup>372</sup>

Besides the Supreme Court's opinion in *Riggins*, it is difficult to imagine intrusions on the body that are more significant than the administration of antipsychotic and other psychotropic medication. Antipsychotic medication is, by definition, mind-altering in nature, and presents a risk of debilitating side effects that may be permanent.<sup>373</sup> However, more important than the risks of side effects is the Supreme Court's recognition that "[a]t the heart of liberty is the right to define one's own concept of existence,"<sup>374</sup> which means that liberty certainly includes deciding whether or not to submit to a regimen of psychotropic medication.<sup>375</sup> No one can seriously dispute that forcing a person diagnosed as mentally ill to accept medication shapes a substantial aspect of the person's life, which abridges a patient's right to bodily autonomy.<sup>376</sup> In addition,

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the proposition that the right of an involuntarily hospitalized person to refuse medication "is derived from each person's fundamental right to be free from unjustified intrusions on personal security." *White v. Napoleon*, 897 F.2d 103, 112 (3d Cir. 1990).

Two courts that addressed the right of a pretrial detainee to refuse medication have concluded that the right is fundamental. *See Bee v. Greaves*, 744 F.2d 1387, 1392-93 (10th Cir. 1984); *Woodland v. Angus*, 820 F. Supp. 1497, 1509 (D. Utah 1993).

372. *See Rennie III*, 653 F.2d 836, 844 (3d Cir. 1981) (forcible administration of medication implicates right to remain free from unjustified intrusions on personal security); *Rogers II*, 634 F.2d 650, 653 (1st Cir. 1980) (constitutional interest in deciding for oneself to submit to or refuse antipsychotic drugs most likely derives from the penumbral right to privacy, bodily integrity, or personal security); *Davis v. Hubbard*, 506 F. Supp. 915, 929-30 (N.D. Ohio 1980); *Rogers I*, 478 F. Supp. 1342, 1366 (D. Mass. 1979) (right to dispose of one's property fundamental to any ordered liberty; such right pales in comparison to decision as to whether to accept or refuse psychotropic medication which is basic to any right of privacy); *Rennie I*, 462 F. Supp. 1131, 1144 (D. N.J. 1988) (right to refuse treatment best founded on right of privacy which is broad enough to include right to protect one's mental processes from government interference); *In re K.K.B.*, 609 P.2d 747, 751 (Okla. 1980).

373. *See supra* notes 78-128 and accompanying text; *Gelman, supra* note 44, at 1265 (stating that severe harms caused by antipsychotic drugs occur on "far broader scale than lobotomy ever did").

374. *Planned Parenthood v. Casey*, 505 U.S. 833, 851 (1992).

375. *See, e.g., Gelman, supra* note 44, at 1208 (commenting that when government forcibly administers medication, it "does not merely invade a body but reconstitutes a person's physical constitution to suit its purposes").

376. *See Rubenfeld, supra* note 283, at 784. It is the state's systemic attempts to shape a person's existence that separates in part the administration of medication issue from a trilogy of Supreme Court cases involving intrusions on the body in which the Court's decisions substantially focused on the risk of harm to the person.

In *Rochin v. California*, 342 U.S. 165 (1952), police involuntarily transported a suspect to a hospital and forced an emetic solution through a tube into his stomach that induced vomiting. *Id.* at 166. The police found two morphine capsules in the vomited matter. *Id.* The Court found that

the state has decided for the patient that the risks associated with psychotropic medication are acceptable. In so doing, the state implicitly decides for the patient that any harm suffered is justified regardless of the ultimate efficacy of the treatment. The patient loses the right to make medical decisions that may substantially define his or her existence and may significantly debilitate him or her.<sup>377</sup> Since *Riggins* and *Harper* served as authority for the proposition that the constitutional interests in personal security and bodily integrity are fundamental, and since *Planned Parenthood* served as authority for the conclusion that the

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the police conduct “shock[ed] the conscience,” *id.* at 172, and reversed the defendant’s conviction. *Id.* at 174.

Twelve years later in *Schmerber v. California*, 384 U.S. 757 (1966) the Court examined the issue of whether the Fourth Amendment’s protection of personal privacy and dignity protected a defendant who was charged with driving under the influence of alcohol from an unwanted blood test. In holding that it did not, the Court noted that “[s]uch tests are a commonplace in these days of periodic physical examination and experience with them teaches that the quantity of blood extracted is minimal, and that for most people, the procedure involves no risk, trauma, or pain.” *Id.* at 771. The Court warned that while the Constitution permitted the minor intrusion of a blood test, such a holding does not indicate that more substantial intrusions are permitted. *Id.* at 772.

It was such a more substantial intrusion, namely, surgery to remove a bullet in order to use the bullet as evidence, that the Court prohibited in *Winston v. Lee*, 470 U.S. 753 (1985). A critical factor in determining whether an intrusion was justified, which distinguished this case from *Schmerber*, was the extent to which the proposed procedure would threaten the health or safety of the individual. *Id.* at 761-62 n.5. While the parties disagreed as to the magnitude of the risk involved, it was exactly this disagreement that established a risk. *See id.* at 764.

It is not particularly pertinent that *Winston* was a Fourth Amendment case, as the Supreme Court relied on it to support its substantive due process analysis in *Planned Parenthood*, 505 U.S. at 849. While *Winston* and its antecedents support the concept of bodily integrity essential to the Supreme Court’s analysis in *Planned Parenthood*, they, like the situation in *Union Pacific Railway Co. v. Botsford*, 141 U.S. 250 (1891), involved one-time attempts by the state to invade a person’s body. As such, because substantive due process involves a balancing of the individual’s rights and the demands of organized society, *Youngberg v. Romeo*, 457 U.S. 307, 320 (1982), the magnitude of harm to the individual is a greater consideration when evaluating the scope of a person’s right to refuse drugs.

More significantly, the magnitude of side effects plays a limited role in constitutional analysis because the historic sanctity of the right to refuse has evolved from the common law right to control one’s own person that found constitutional protection under *Botsford*, 141 U.S. at 256. Under common law analysis, the magnitude of intrusions have no bearing on the right to control one’s course of treatment. *See supra* notes 353-63 and accompanying text; *see also infra* note 379 and accompanying text. It is important to recognize the limited role in constitutional analysis played by drugs’ harmful side effects. At least one court limited its analysis of the right to refuse medication to the right to refuse antipsychotic drugs because the court concluded that antipsychotic drugs have a far higher potential for harmful side effects than do psychotropic medication in general, which may include anti-depressants and lithium. *See Rogers II*, 634 F.2d 650, 653 n.1 (1st Cir. 1980).

377. *See supra* notes 55-128 and accompanying text.

right to an abortion is fundamental,<sup>378</sup> it is inconceivable that the right to refuse medication can be characterized in a manner other than fundamental.<sup>379</sup>

### *C. The Standard of Review*

A recognition that the right to refuse medication is fundamental in nature only begins the inquiry as to the scope of this right.<sup>380</sup> A court must then examine the competing state interests to determine under what circumstances state interests will override the patient's interest in refusing treatment.<sup>381</sup> In evaluating these competing considerations, a court must adopt a standard of review to scrutinize governmental conduct which will impact the scope of deference that the court will give to the state's decision to administer medication over objection.<sup>382</sup> Put another way, the particular standard of review adopted by a court is particularly important because it "determines when the Due Process Clause of the Fourteenth Amendment will override a State's substantive policy choices, as reflected in its laws."<sup>383</sup>

The Supreme Court has held that, at least in the institutional setting of a prison, "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."<sup>384</sup> Accordingly, actions of prison officials "are judged under a 'reasonableness' test less restrictive than that ordinarily applied to alleged infringements of fundamental constitutional rights."<sup>385</sup> The Supreme Court has promulgated the reasonableness standard (or the *Turner* standard) in order to facilitate the resolution of difficult judgments concerning institutional operations by prison administrators other than the courts.<sup>386</sup>

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378. *Planned Parenthood*, 505 U.S. at 847-51, 857.

379. See *Harper*, 494 U.S. at 238, 241 (Stevens, J., dissenting) (stating that "liberty of citizens to resist the administration of mind altering drugs arises from our Nation's most basic values" and that the right of competent individual to refuse drugs "is a fundamental liberty interest deserving the highest order of protection").

380. See *Planned Parenthood*, 505 U.S. at 919 n.5 (Stevens, J., concurring in part and dissenting in part); *Rogers III*, 457 U.S. 291, 299 (1982).

381. *Harper*, 494 U.S. at 220; *Rogers III*, 457 U.S. at 299; *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261, 279 (1990).

382. See, e.g., *Webster v. Reproductive Health Servs.*, 492 U.S. 490, 548 (1989) (Blackmun, J., dissenting) (commenting that the rational basis, intermediate and strict scrutiny tests measure strength and scope of constitutional rights to be balanced against competing interests of the government); *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 356-358 (1987) (Brennan, J., dissenting) (stating "The use of differing levels of scrutiny proclaims that on some occasions official power must justify itself in a way that otherwise it need not.").

383. *Foucha v. Louisiana*, 504 U.S. 71, 116 (1992) (Thomas, J., dissenting).

384. *Turner v. Safley*, 482 U.S. 78, 89 (1987).

385. *O'Lone*, 482 U.S. at 349.

386. *Turner*, 482 U.S. at 89. In recognizing the desirability of deferring to prison administrators, the Court concluded that

Upon initial analysis, one may conclude that a state's interest in maintaining hospital operations parallels that of its interests in prison administration, which similarly warrants the adoption of an identical or similar standard of review.<sup>387</sup> However, upon scrutiny, there are marked differences between the confinement of mentally ill individuals and the confinement of prisoners which make adoption of the *Turner* standard, or criteria similar to the *Turner* standard, inappropriate. Prisons and psychiatric hospitals involve two entirely different settings, housing two entirely different populations who have been confined for entirely different sets of reasons, and whose confinement has engendered entirely different legal consequences.

In formulating the standard of review applicable to the prison context, the Supreme Court has taken account of "the unique circumstances of penal confinement."<sup>388</sup> A person convicted of a crime has acted with a specific *mens rea* and engaged in behavior that has violated social norms by engaging in behavior that is not "within a range of conduct that is generally acceptable."<sup>389</sup> These individuals have demonstrated an "inability, or refusal, to conform their conduct to the norms demanded by a civilized society."<sup>390</sup>

On the other hand, civil hospitals contain both voluntary and involuntary patients. These individuals do not pose the potential management problem that prisoners present.<sup>391</sup> Unlike prisoners who have acted with a particular state of

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[s]ubjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration. The rule would also distort the decisionmaking process, for every administrative judgment would be subject to the possibility that some court somewhere would conclude that it had a less restrictive way of solving the problem at hand. Courts inevitably would become the primary arbiters of what constitutes the best solution to every administrative problem, thereby "unnecessarily perpetuat[ing] the involvement of the federal courts in affairs of prison administration."

*Id.* (quoting *Procunier v. Martinez*, 416 U.S. 396, 407 (1974)).

387. See *White v. Napoleon*, 897 F.2d 103, 113 (1990) (stating "Given the similarity of the State's interests in the administration of mental hospitals and prisons, the limitation on a prisoner's right of refusal should be similar to the limitation on the right of an involuntarily committed mental patient.").

388. *Riggins v. Nevada*, 504 U.S. 127, 134 (1992).

389. *Jones v. United States*, 463 U.S. 354, 367 (1983) (quoting *Addington v. Texas*, 441 U.S. 418, 426-427 (1979)).

390. *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119, 137 (1977) (Burger, C.J., concurring).

391. The Supreme Court has recognized that prison life contains the "ever-present potential for violent confrontation and conflagration." *Jones*, 433 U.S. at 132. There is ample case law arising out of prison riots. See, e.g., *Hillard v. Couglin*, 187 A.D.2d 136 (1993); *Jones v. Couglin*, 177 A.D.2d 1061 (1991); *Whitely v. Albers*, 475 U.S. 312 (1986). On the other hand, LEXIS and WESTLAW searches have not been able to uncover any sort of documentation of even one riot in a psychiatric hospital.

mind to engage in conduct that is deemed dangerous to society,<sup>392</sup> not all civil patients have engaged in dangerous conduct. Rather, they have been confined simply because they pose a *risk* of harm to themselves or others.<sup>393</sup> The commission of a criminal act is so significant from a constitutional perspective that it provides justification for a state to treat an insanity acquittee, someone who has been found not guilty by reason of mental disease or defect, differently than civilly committed patients by imposing more stringent release and discharge procedures.<sup>394</sup> Moreover, while it is well settled that the Constitution permits a state to involuntarily confine individuals who have been deemed to pose a danger to themselves or others,<sup>395</sup> many patients are confined for another reason. Rather, these patients require hospitalization because their illness is so debilitating that they are unable to meet the basic necessities of life.<sup>396</sup> Accordingly, particularly with the supervision that a hospital setting provides,<sup>397</sup> psychiatric patients do not comprise the threatening population that prisoners frequently do.<sup>398</sup> Hence, psychiatric patients pose a substantially smaller risk of harm than do prisoners.<sup>399</sup>

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392. See *Jones*, 463 U.S. at 364-65.

393. See John Monahan & David B. Wexler, *A Definite Maybe: Proof and Probability in Civil Commitment*, 2 L. & HUMAN BEHAV. 37, 38 (1978) (stating that civil commitment may be premised on characteristics of an individual which is associated with dangerous behavior); see also *Jones*, 463 U.S. at 367 (recognizing that individuals can be civilly committed without engaging in a violation of any criminal laws); *Project Release v. Prevost*, 722 F.2d 960, 973-74 (1983) (finding that an overt act evincing dangerousness is not a constitutional prerequisite for commitment); *In re Harry M.*, 468 N.Y.S.2d 259, 365 (N.Y. App. Div. 1983) (defining dangerous as a *risk* of harm to self or others).

394. *Jones*, 463 U.S. at 370; *Glatz v. Kort*, 807 F.2d 1514, 1522 (10th Cir. 1986); *Warren v. Harvey*, 632 F.2d 925, 931 (2d Cir. 1980); *United States, v. Ecker*, 543 F.2d 178, 195-96 (D.C. Cir. 1976).

395. See, e.g., *O'Connor v. Donaldson*, 422 U.S. 563, 576 (1975) ("[A] state cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends."); *Project Release*, 722 F.2d at 973.

396. See, e.g., *O'Connor*, 422 U.S. at 574 n.9 (stating that "even if there is no foreseeable risk of self-injury or suicide, a person is literally 'dangerous to himself' if for physical or other reasons he is helpless to avoid the hazards of freedom"); *Lynch v. Baxley*, 386 F. Supp. 378, 391 (M.D. Ala. 1974) (finding that harm that justifies commitment can manifest itself in neglect or refusal to care for oneself); *In re Harry M.*, 468 N.Y.S.2d at 365 (stating danger to self includes inability to meet essential needs of food, clothing or shelter).

397. Hospital staff are trained in dealing with potential violence and can lessen the threat of harm by utilizing such techniques as segregation, physical restraints, psychotherapy and behavior therapy. Morris, *supra* note 227, at 358 n.71.

398. See, e.g., *In re K.K.B.*, 609 P.2d 747, 751 (Okla. 1980) (recognizing that commitment eliminates threat of harm and except in emergency situations, hospital personnel are not in danger); *Rogers I*, 478 F. Supp. 1342, 1369 (D. Mass. 1979); *Opinion of the Justices*, 465 A.2d 484, 489-90 (N.H. 1983).

399. Morris, *supra* note 227, at 358.

Second, in no way can a civil commitment proceeding be equated with a criminal prosecution.<sup>400</sup> Incarceration in a prison is society's response to a criminal offense that reflects, *inter alia*, retribution.<sup>401</sup> Because of its punitive nature, prison confinement is supposed to be more onerous than confinement in a psychiatric hospital.<sup>402</sup> The conviction of a crime results in a forfeiture of many basic liberties that ordinary citizens possess.<sup>403</sup> That a large number of states require prisoners to forfeit basic liberties is relevant when formulating constitutional standards pertaining to fundamental rights, such as the reasonableness test in *Turner v. Safley*.<sup>404</sup> In sum, “[l]awful incarceration brings about the necessary withdrawal or limitation of many privileges and rights, a retraction justified by the considerations underlying our penal system.”<sup>405</sup> As such, constitutional standards pertaining to individual rights in prisons are based upon, *inter alia*, an individual's status as a prisoner.<sup>406</sup> The reasonableness standard of *Turner* reflects society's determination that by committing crimes, the rights of prisoners are narrower than ordinary citizens.<sup>407</sup>

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400. *Addington v. Texas*, 441 U.S. 418, 428 (1979).

401. *Jones v. United States*, 463 U.S. 354, 368-69 (1983).

402. *See Heller v. Doe*, 509 U.S. 312, 325 (1993).

403. *See, e.g.*, ALASKA STAT. § 33.30.241 (Michie 1996) (felony involving moral turpitude disqualified from voting); ARIZ. REV. STAT. ANN. § 13-904 (West Supp. 1997) (felony conviction suspends such civil rights as the right to vote, hold a public office, serve as a juror and any civil right reasonably necessary for prison security); CAL. PENAL CODE §2600 (West 1982) (prisoner forfeits rights necessary for reasonable security); FLA. STAT. ANN. § 944.292 (conviction suspends civil rights) (West 1996); HAW. REV. STAT. ANN. § 831-25 (Michie 1994) (loss of right to vote and hold office); ILL. COMP. STAT. ANN. § 5-5-5 (West 1997) (loss of right to vote or hold office); MISS. CODE ANN. § 99-19-35 (1972) (convict prohibited from holding office); NEB. REV. STAT. § 29-112 (1993) (civil rights and privileges); N.Y. CIV. RIGHTS LAW § 79 (McKinney 1992) (imprisonment results in forfeiture of civil rights); OHIO REV. CODE ANN. § 2961.01 (Banks-Baldwin 1997) (denial of right to hold office); OKLA. STAT. ANN. § 65 (West 1983) (imprisonment suspends civil rights); R.I. GEN. LAWS § 13-6-1 (1956) (person subject to life imprisonment shall be deemed dead with respect to all civil rights).

404. 482 U.S. 78 (1987). *Cf. Schall v. Martin*, 467 U.S. 253, 268 (1984) (commenting that a practice followed by a large number of states is plainly worth considering to determine whether the practice offends some principle of justice “so rooted in the traditions and conscience of our people as to be ranked as fundamental”); *Board of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 88 (1978) (quoting *Leland v. Oregon*, 343 U.S. 790, 798 (1952) (quoting *Snyder v. Massachusetts*, 291 U.S. 97 (1934))).

405. *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119, 125 (1977) (quoting *Price v. Johnston*, 334 U.S. 266, 285 (1948)).

406. *See Pell v. Procunier*, 417 U.S. 817, 822 (1974) (prison inmate retains only those First Amendment rights consistent with his prisoner status).

407. *See supra* note 404 and accompanying text; *Cooper v. Oklahoma*, 517 U.S. 348, 360, 368 (1996) (finding the fact that only four states place the burden of proving incompetence by clear and convincing evidence evinces the “deep roots and fundamental character” of a defendants' right not to stand trial unless it is more likely than not that he has capacity to stand trial).

On the other hand, civilly committed individuals “are entitled to more considerate treatment and conditions of confinement than criminals whose conditions of confinement are designed to punish.”<sup>408</sup> Significantly, civilly committed patients, unlike prisoners, retain their civil rights in virtually every state.<sup>409</sup> Additionally, case law arising out of jurisdictions that have addressed the right to refuse medication in both the psychiatric hospital and prison contexts support the appropriateness of according less deference to hospital clinicians than to prison officials. These jurisdictions have limited the forcible administration of medication to civilly committed patients to instances when an emergency was imminent or when such individuals were found incompetent to make treatment decisions.<sup>410</sup> However, these same courts permitted institutional considerations, such as the maintenance of prison discipline, to override a prisoner’s interest in refusing medication.<sup>411</sup>

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408. *Youngberg v. Romeo*, 457 U.S. 307, 322 (1982).

409. ALA. CODE §§ 22-52-1 to 22-52-72 (1984); ALASKA STAT. § 47.30.835 (Michie 1984); ARIZ. REV. STAT. ANN. § 36-506 (West 1993); ARK. CODE ANN. § 20-47-220 (Michie Supp. 1989); CAL. WELF. & INST. CODE §§ 5325.1, 5327 (West 1984); COLO. REV. STAT. § 27-10-104 (1990); CONN. GEN. STAT. ANN. § 17a-541 (West 1992); D.C. CODE ANN. § 21-564 (1981); FLA. STAT. ANN. § 394.459(1) (West 1993); GA. CODE ANN. § 37-3-140 (1985); HAW. REV. STAT. § 334-61 (1985); IDAHO CODE § 66-346(a)(6) (1989); 405 ILL. COMP. STAT. ANN. 5/2-100 (West 1997); IND. CODE ANN. § 12-26-2-8 (Michie 1997); IOWA CODE ANN. § 229.27(1) (West 1994); HAW. STAT. ANN. 59-2948(a) (West 1978 and Supp. 1997); KAN. STAT ANN. 59-2948 (West 1978 & Supp. 1997); LA. REV. STAT. ANN. § 28-1-171 (West 1989); ME. REV. STAT. ANN. tit. 34-B, § 3803(1) (West 1988); MD. CODE ANN. HEALTH GEN. I § 10-704 (Supp. 1989); MASS. ANN. LAWS ch. 123, § 23 (West Supp. 1998); MICH. COMP. LAWS ANN. § 330.1489(1) (West 1992); MINN. STAT. ANN. § 253B.23(2) (West 1994); MISS. CODE ANN. § 41-21-101 (1993); MO. ANN. STAT. § 630.120 (West 1988); MONT. CODE ANN. § 53-21-141 (1997); NEB. REV. STAT. § 83-1066(1) (1994); NEV. REV. STAT. ANN. § 433A.460 (Michie 1996); N.H. REV. STAT. ANN. § 135-C:56 (1996); N.J. STATE ANN. § 30:4-24.2(a), 30:4-24.1 (West 1997); N.M. STAT. ANN. § 43-1-5 (Michie 1989); N.Y. MENTAL HYG. LAW § 33.01 (McKinney 1996); N.C. GEN. STAT. § 122C-58 (1996); N.D. CENT. CODE § 25-03.1-33 (1995); OHIO REV. CODE ANN. § 5122.301 (Banks-Baldwin 1996); OKLA. STATE. ANN. tit. 43A, § 1-105 (West 1990); OR. REV. STAT. § 426.385(n) (Supp. 1996); 50 PA. CONS. STAT. ANN. § 7113 (West Supp. 1997); R.I. GEN. LAWS § 40.1-5-5(6) (1984); S.C. CODE ANN. § 44-22-80 (Law. Co-op. 1985); S.D. CODIFIED LAWS § 27A-12-33 (Michie 1984); TENN. CODE ANN. §33-3-104(5) (Supp. 1997); TEX. HEALTH & SAFETY CODE ANN. 576.002 (West 1992); UTAH CODE ANN. § 62(A)-12-245 (1986); VT. STAT. ANN. tit. 18, § 7705(a) (Michie 1987); VA. CODE ANN. § 37.1-87 (Michie 1996); WASH. REV. CODE ANN. § 71.05.450 (West 1992); W. VA. CODE § 27-5-9(a) (1992); WIS. STAT. ANN. § 51.80 (West 1996); WYO. STAT. ANN. § 25-10-121 (Michie 1997). Kentucky has no express provisions.

410. *Rogers v. Commissioner of Dep’t of Mental Health*, 458 N.E.2d 308, 314, 321-22 (Mass. 1983); *Opinion of the Justices*, 465 A.2d 484, 489 (N.H. 1983).

411. *Commissioner of Correction v. Myers*, 399 N.E.2d 452, 458 (Mass. 1979); *In re Caulk*, 480 A.2d 93, 96 (N.H. 1984). In contrast to the provision of treatment in the prison context, the Supreme Judicial Court of Massachusetts explicitly held that the right to control one’s own course of treatment is “superior to the institutional considerations.” *Rogers*, 458 N.E.2d at 317.

Although hospital clinicians are entitled to less deference than prison doctors, this does not necessarily mean that a court should apply the same standard of review that it would apply for an infringement of a fundamental right belonging to a non-confined citizen. An intermediate level of scrutiny may serve to accommodate the competing institutional state concerns and individual desires to avoid intrusive medication. Drawing from the equal protection context, a court might hold that the forced administration of medication is permissible if it serves important government objectives and is substantially related to the achievement of those objectives.<sup>412</sup>

However, upon analysis, a court should apply the same standard of review that it would apply when evaluating an infringement of any other fundamental right belonging to non-hospitalized individuals. Society civilly commits mentally ill individuals for the purpose of providing a benefit in the form of compulsory treatment and such confinement does not have a punitive purpose.<sup>413</sup> More importantly, the near unanimity of the provisions that guarantee a retention of civil rights upon commitment evinces a societal recognition that civilly committed patients should be provided with the same rights as ordinary citizens.<sup>414</sup> This militates toward a standard of review that does not defer to institutional considerations but rather one that requires the government to justify its conduct in the same manner that it would have to justify an infringement of fundamental rights of an ordinary citizen.<sup>415</sup> Indeed, while society labels prisoners less than full citizens and the standard of review reflects this status,<sup>416</sup>

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412. See *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 565 (1990) (involving a challenge to policies of the FCC that gave preferences to minorities); *United States v. Virginia*, 518 U.S. 515 (1996) (challenging males only admission policy of the Virginia Military Institute).

Under this test, it is possible, but not certain, that the forced administration of medication would pass constitutional scrutiny. Providing treatment to mentally ill individuals is an important objective. See, e.g., *Washington v. Harper*, 494 U.S. 210, 225-26 (1990). However, a state's interest in providing medication over objection to all patients is not as great as the state's interest in *Harper* in which the state had an interest in forcibly medicating prisoners who were creating a danger within the prison setting or were gravely disabled. *Id.* at 221-22; see, e.g., *Jones v. United States*, 463 U.S. 354, 370 (1983) (government interest in providing treatment to insanity acquittees insufficient to justify confinement in absence of dangerousness).

413. See *Goetz v. Crosson*, 967 F.2d 29, 34-35 (2d Cir. 1992).

414. See *Cooper v. Oklahoma*, 517 U.S. 348 (1996).

415. Cf. *Martin v. Schall*, 467 U.S. 253, 268 (1984); *O'Lone v. Shabazz*, 482 U.S. 342, 356-58 (1987). Indeed, a comparison of the Supreme Court's decisions in *Harper* and *Rogers III* supports this conclusion. In *Harper*, 494 U.S. at 223-27, the Court built its Due Process Clause analysis around the *Turner* reasonableness standard. On the other hand, while at the time the Court decided *Rogers III* there was ample case law recognizing the need to defer to institutional considerations in a prison setting. See, e.g., *Procunier v. Martinez*, 416 U.S. 396, 405 (1974); *Pell v. Procunier*, 417 U.S. 817, 827 (1974); *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119, 128-129 (1977). The Supreme Court eschewed reliance upon any of these institutional concerns when it decided *Rogers III*, 457 U.S. at 300-04.

416. See *supra* notes 401-04 and accompanying text.

society views civilly committed patients as equal citizens.<sup>417</sup> The standard of review should reflect this societal determination.

*D. The State Interests that Override, and Accordingly, Limit the Fundamental Right to Refuse Medication*

When assessing the scope of the right to refuse medication, a court must balance the competing individual and state interests.<sup>418</sup> Generally, only a compelling state interest will override a fundamental right and only when the means are tailored to further these interests.<sup>419</sup> Perhaps because the Supreme Court was concerned about a court excessively imposing its own values on the balancing process,<sup>420</sup> the Supreme Court in *Rogers III* concluded that when evaluating government attempts to override an interest in refusing medication, a court "may look to state law" to identify the scope of the competing individual and state interests.<sup>421</sup> Reliance on state law to guide the balancing process when evaluating the scope of the right to refuse is appropriate because history and tradition protect the common law right to determine one's own course of treatment. That common law right serves as the underpinning for the determination that the right to refuse medication is fundamental.<sup>422</sup> In this sense, reliance on state law provides for a consistent and non-arbitrary application of history and tradition when delineating the scope of the right to refuse.<sup>423</sup>

The Supreme Court's decision in *Ingraham v. Wright*<sup>424</sup> further suggests that liberty within the Fourteenth Amendment includes the common law right to bodily autonomy and that the common law will define the scope of a patient's substantive right to refuse. Reference to *Ingraham* is particularly apt because when, in *Rogers III*, the Supreme Court cited *Ingraham* it suggested that a court may look to state law to guide the balancing process.<sup>425</sup>

In *Ingraham*, the Court examined the contours of a child's right to remain free from corporal punishment and recognized that liberty within the Fourteenth Amendment "included the right 'generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free

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417. See *supra* note 408-09 and accompanying text.

418. See *Washington v. Glucksberg*, 117 S. Ct. 2258, 2283-84 (1997) (Souter, J., concurring); *Rogers III*, 457 U.S. at 299; see also *Youngberg*, 457 U.S. at 320 (substantive due process requires balancing of "'the liberty of the individual' and 'the demands of an organized society'"') (quoting *Poe v. Ullman*, 367 U.S. 497, 452 (1961) (Harlin, J. dissenting)).

419. See, e.g., *Zablocki v. Redhail*, 434 U.S. 374, 388 (1978); *Roe v. Wade*, 410 U.S. 113, 155 (1973).

420. See *Youngberg*, 457 U.S. at 321.

421. *Rogers III*, 457 U.S. at 304.

422. See *supra* notes 358-61 and accompanying text.

423. See *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986).

424. 430 U.S. 651 (1977).

425. *Rogers III*, 457 U.S. at 304.

men.”<sup>426</sup> This common law liberty included the right to remain free from unjustified intrusions on personal security.<sup>427</sup> However, because a child’s liberty interest in avoiding corporal punishment was rooted in history, it was subject to historic limitations that defined the scope of the protected right<sup>428</sup>: “Under that longstanding accommodation of interests, there can be no deprivation of substantive rights as long as disciplinary corporal punishment is within the limits of the common-law privilege.”<sup>429</sup> While *Ingraham* addressed the procedural protections required when a school imposed corporal punishment, the Court’s discussion of the interrelationship between common law rights and Fourteenth Amendment liberty is certainly instructive.

When the Supreme Court in *Rogers III* relied upon *Ingraham* as authority for its pronouncement that a court should resort to common law to identify the weight to accord the competing individual and state interests, the Court closed the constitutional circle begun in *Union Pacific Railway Co. v. Botsford*.<sup>430</sup> In *Botsford*, the Court recognized that the Constitution protects the common law right of citizens to control the sanctity of their bodies.<sup>431</sup> In *Meyer v. Nebraska*,<sup>432</sup> the Court recognized that liberty included at least those common law rights necessary to an orderly pursuit of happiness.<sup>433</sup> *Meyer* served as authority for *Ingraham* which served as authority for *Rogers III*. Hence, *Rogers III* and *Ingraham* stand for the position that, at the very least, because the right to personal security, which includes the right to control one own’s course of treatment, is fundamental, the Constitution’s substantive protection is at least as broad as common law.

State court decisions addressing the right to refuse medication and the right to decline life-sustaining treatment provide guidance when evaluating the weight to accord competing individual and state interests. A number of state courts, most of which were the highest courts in the state, have addressed the right to refuse medication.<sup>434</sup> Many of these courts have addressed the question of when,

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426. *Ingraham*, 430 U.S. at 673 (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

427. *Id.* In support of its conclusion that common law liberty included the right to personal security, the Supreme Court cited, *inter alia*, *Union Pacific Railway Co. v. Botsford*, 141 U.S. 250, 251-252 (1891), which recognized the right to make decisions about one’s body, and *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905), which addressed an individual’s right to remain free from an unwanted medical vaccination. *Id.* at n.42.

428. *Ingraham*, 430 U.S. at 675.

429. *Id.*

430. 141 U.S. 250 (1891).

431. *Id.* at 251.

432. 262 U.S. 390 (1923).

433. *Id.* at 399.

434. See, e.g., *Anderson v. State*, 663 P.2d 570 (Ariz. Ct. App. 1982); *Riese v. Saint Mary’s Hosp. & Med. Ctr.*, 271 Cal. Rptr. 199 (Cal App. 1987); *People v. Medina*, 705 P.2d 961 (Colo. 1985); *Goedecke v. State Dep’t of Insts.*, 603 P.2d 123 (Colo. 1979); *In re Mental Commitment of M.P.*, 510 N.E.2d 645 (Ind. 1987); *Rogers v. Commissioner of Dep’t of Mental Health*, 458 N.E.2d 308 (Mass. 1983); *Jarvis. v. Levine*, 418 N.W.2d 139 (Minn. 1988); Opinion of the Justices,

under state law, state interests will override an individual's interest in refusing medication. Generally, these courts have interpreted state statutory law, the state constitution or common law. These courts have concluded that the only state interests that are sufficiently compelling to justify the forcible administration of medication are the state interests in alleviating dangerous situations within a hospital setting, i.e., emergencies, and providing help to patients who lack the capacity to make treatment decisions.<sup>435</sup>

In the absence of a state court decision addressing the right to refuse drugs, case law governing the right to decline life-sustaining treatment can be instructive. Little question exists that, like the right to refuse medication, the decision to decline life-sustaining treatment falls within one's right to bodily autonomy a right protected by common law and state constitutions.<sup>436</sup> Generally, four state interests have been offered to override an individual's right under state law to refuse life-sustaining treatment: (1) the preservation of life; (2) the protection of innocent third parties; (3) the prevention of suicide; and (4) maintenance of ethical standards of the medical profession.<sup>437</sup> Any assessment

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465 A.2d 484 (N.H. 1983); *Rivers v. Katz*, 495 N.E.2d 337 (N.Y. 1986); *In re K.K.B.*, 609 P.2d 747 (Okla. 1980); *State ex rel. Jones v. Gerhardstein*, 416 N.W.2d 883 (Wis. 1987).

435. See *Riese*, 271 Cal. Rptr. at 210 (under state statute, state may not forcibly administer medication in non-emergency situation absent a judicial determination of incompetence); *Goedecke*, 603 P.2d at 125 (common law right to refuse medication in non-emergency situations absent determination that patient is incapable in participating in treatment decisions); *In re Mental Commitment of M.P.*, 510 N.E.2d at 647 (in order to override statutory right to refuse treatment, state must demonstrate, *inter alia*, that probable benefits from treatment outweigh risk of harm to, and personal concerns of, patient); *Rogers*, 458 N.E.2d at 314-21 (under state law, absent a judicial determination of incompetence, state may forcibly medicate only if patient poses an imminent threat of harm and there are no less intrusive alternatives); *Jarvis*, 418 N.W.2d at 148 & n. 7 (finding of incompetence prerequisite to involuntary medication under state law); *Opinion of the Justices*, 465 A.2d at 488-89 (only protection of patient and others from harm and treatment of incompetent patient justify forced treatment under state constitution); *Rivers*, 495 N.E.2d at 343 (only present danger within a hospital and the provision of treatment to an incompetent patient are sufficiently compelling to override patient's interest in refusing treatment under state constitution). In *In re K.K.B.*, 609 P.2d at 751, the court held that absent an emergency, patients could refuse medication. However, the court apparently based this decision not on state law but on the right to privacy under the Federal Constitution. *Id.* *State ex rel. Jones*, 416 N.W. at 894 (under state law, only when medication is necessary to prevent harm or when probable cause exists to believe patient is incompetent, may state override right to refuse medication).

436. See, e.g., *Bouvia v. Superior Court*, 225 Cal. Rptr. 297, 301-02 (Cal. App. 1986); *Foody v. Manchester Mem'l Hosp.*, 482 A.2d 713, 717 (Conn. Super. 1984); *In re L.H.R.*, 321 S.E.2d 716, 722 (Ga. 1984); *In re Gardner*, 534 A.2d 947, 951 (Me. 1987); *Brophy v. New England Sinai Hosp, Inc.*, 497 N.E.2d 626, 633 (Mass. 1986); *In re Caulk*, 480 A.2d 93, 95 (N.H. 1984); *In re Conroy*, 486 A.2d 1209, 1221-22 (N.J. 1985); *In re Storar*, 52 N.Y.2d 363, 377 (1981); *Eichner v. Dillon*, 426 N.Y.S.2d 517, 536 (N.Y. App. Div. 1980); *Estate of Leach v. Shapiro*, 469 N.E.2d 1047, 1051-52 (Ohio Ct. App. 1984).

437. See, e.g., *Thor v. Superior Court*, 855 P.2d 375, 383 (Cal. 1993); *Bouvia*, 225 Cal. Rptr.

of the weight to accord interests in preserving life and preventing suicide are irrelevant when extrapolating right to die case law to the refusal of treatment context. Denying patients the right to refuse medication when they pose a danger to others within the hospital setting is essentially equivalent to the interest in protecting innocent third parties. Accordingly, if one relies upon right to die case law to examine what state interests will override a patient's right to refuse medication, only the interest in maintaining the ethical integrity of the medical profession can serve to further limit a patient's right to refuse.

Yet, the state interest in maintaining the ethical integrity of the medical profession does not constitute a particularly strong interest.<sup>438</sup> Indeed, to the extent that the doctrine of informed consent requires physicians to provide enough information about proposed treatment measures so that patients can make knowing and intelligent decisions about the treatment recommended, such law subordinates the ethical integrity of the medical profession to the individual's right to control his or her own course of treatment.

While the Supreme Court's decisions in *Rogers III*, *Youngberg* and *Ingraham* render inappropriate any attempts to reject state law, including common law, as the framework to balance competing interests,<sup>439</sup> if one looks to Federal Constitutional law, the results remain the same. This is so because an absence of state law requires a court to find an overriding justification for, or compelling state interest that justifies, the forcible administration of medication.<sup>440</sup>

The state interest in forcibly medicating patients in order to provide treatment to legally competent patients who could benefit from treatment is not sufficiently compelling. It is well-settled that the government may not confine for compulsory treatment individuals who are mentally ill, but are not dangerous.<sup>441</sup> Hence, the state interest in providing treatment deemed beneficial

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at 307; *Foody*, 482 A.2d at 718; *Satz v. Permutter*, 379 So. 2d 359, 360 (Fla. 1980), *aff'g* 362 So. 2d 160, 162 (Fla. App. 1978); *In re Torres*, 357 N.W.2d 332, 339 (Minn. 1984); *In re Conroy*, 486 A.2d at 1223; *Brophy*, 497 N.E.2d at 634; *In re Colyer*, 660 P.2d 738, 743 (Wash. 1983).

438. See Clayton, *supra* note 25, at 24. As the author recognized, "there is 'no justification for physicians in general, or psychiatrists in particular, to have more power than such other experts to override the expressed wishes of people or to have greater responsibility for harm to self or the public caused by the intemperate behavior of clients.'" *Id.*; see also *Thor*, 855 P.2d at 386; *Bouvia*, 225 Cal. Rptr. at 305; *Satz*, 362 So. 2d at 163-64; Superintendent of Belchertown State Sch. v. *Saikewicz*, 370 N.E.2d 417, 426-27 (Mass. 1977); *In re Conroy* 486 A.2d at 1224-25; *Rivers*, 495 N.E.2d at 343. Furthermore, because physicians consider care and treatment to be their first priority, see *Stefan*, *supra* note 14, at 657, permitting medical ethics to override the right to refuse is tantamount to adopting the professional judgment standard as a test for the standard for refusing medication.

439. See *supra* notes 424-29 and accompanying text.

440. See *Riggins v. Nevada*, 504 U.S. 127, 135 (1992); *Roe v. Wade*, 410 U.S. 113, 155 (1973).

441. See, e.g., *Jones v. United States*, 463 U.S. 354, 370 (1983); *O'Connor v. Donaldson*, 422 U.S. 563, 576 (1975); *Project Release v. Prevost*, 722 F.2d 960, 973 (2d Cir. 1983); *Doremus v. Farrell*, 407 F. Supp. 509, 514 (D. Neb. 1975). In *Jones*, the Supreme Court equated insanity

is insufficient to override an individual's interest in physical liberty.<sup>442</sup> There is nothing to indicate that one's fundamental interest in bodily autonomy is appreciably less compelling than a person's interest in physical liberty as to enable the government to provide treatment to a legally competent person.<sup>443</sup>

The Supreme Court's decision in *Jacobson v. Massachusetts*<sup>444</sup> is consistent with the proposition that only the state interest in preventing or eliminating physical harm can justify the intrusive nature of forced medication. In *Jacobson*,

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acquittees to civil patients and concluded that a patient is entitled to release if he is not dangerous, regardless of whether he is still mentally ill and can still benefit from treatment. The Court concluded that the "purpose of commitment following an insanity acquittal, *like that of civil commitment*, is to treat the individual's mental illness and protect him and society from his potential dangerousness. The committed acquittee is entitled to release when he has recovered his sanity *or* is no longer dangerous." *Jones*, 463 U.S. at 368 (emphasis added). In *Foucha v. Louisiana*, 504 U.S. 71, 77-78 (1990), the Supreme Court reaffirmed this holding.

442. *See supra* note 441. Two cases illustrate this rationale. In *Doremus*, the court recognized the following:

Considering the fundamental rights involved in civil commitment, the *parens patriae* power must require a compelling interest of the state to justify the deprivation of liberty. In the mental health field, where diagnosis and treatment are uncertain, the need for treatment without some degree of imminent harm to the person or dangerousness to society is not a compelling justification.

*Doremus*, 407 F. Supp. at 514 (emphasis added).

In holding that the state cannot confine a nondangerous individual, the court in *In re Harry M.*, 468 N.Y.S.2d 359, 364 (N.Y. App. Div. 1983), concluded that "[a]bsent an overriding State interest . . . a patient has the basic right to control his own course of treatment . . . Society abounds with persons who should be hospitalized, either for gallbladder surgery, back operations, corrective orthopedic surgery, or other reasons; yet, in these areas society would not contemplate involuntary hospitalization for treatment." (internal quotes omitted).

These civil commitment cases that address what overriding state interests justify forced treatment in the form of involuntary hospitalization involved legally competent individuals, as it is well settled that even after civil commitment, patients remain legally competent. *See supra* note 409 and accompanying text. However, courts have recognized, that when patients have been found legally incompetent, at least in connection with their ability to make treatment decisions, the state interest in providing treatment to individuals who lack the ability to make such decisions for themselves constitutes a sufficiently compelling state interest that justifies forced treatment. *See Rogers II*, 634 F.2d 650, 657 (1st Cir. 1980), *Winters v. Miller*, 446 F.2d 65, 71 (2d Cir. 1971); *In re K.K.B.*, 609 P.2d 747, 750 (Okla. 1980).

443. Indeed, while the Supreme Court has frequently recognized the fundamental nature of the right to make medical decisions that impact upon the physical condition of a person, *see supra* notes 353-55 and accompanying text, the Court has only recently indicated that physical liberty is a right that is fundamental in nature. *See Foucha*, 504 U.S. at 80, 86. Previous cases required a determination of dangerousness in order to justify the confinement of a mentally ill person without concluding that liberty is fundamental. *See O'Connor*, 422 U.S. at 576; *Jones*, 463 U.S. at 366-70; *Project Release*, 722 F.2d at 971-73.

444. 197 U.S. 11 (1905).

the Court examined a challenge to a Massachusetts law that permitted local governments to require individuals to submit to a vaccination.<sup>445</sup> In scrutinizing this law, the Court recognized that the state legislature sought to “suppress the evils of a smallpox epidemic,”<sup>446</sup> which created an “emergency.”<sup>447</sup> The Court concluded that governmental attempts to prevent imminent harm overrode an individual’s right to self-determination: “[T]he power of the public to guard itself against imminent danger depends in every case involving the control of one’s body upon his willingness to submit to reasonable regulations . . . for the purpose of protecting the public collectively against such danger.”<sup>448</sup> Hence, the state’s police power permitted the government to enact regulations that “will protect the public health and the public safety.”<sup>449</sup> *Jacobson* clearly stands for the proposition that compulsory treatment is permissible when the physical well-being of people is at stake. The Court in *Jacobson* permitted the state to require vaccinations because smallpox threatened life, not because the state’s police power permitted forced treatment that would provide treatment that some would deem beneficial.<sup>450</sup>

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445. *Id.* at 12.

446. *Id.* at 30-31.

447. *Id.* at 27.

448. *Id.* at 29-30.

449. *Id.* at 25.

450. Over 50 years prior to *Jacobson*, John Stuart Mill set forth a philosophical basis for the right to refuse medical care except in extremely limited circumstances, which serves as justification today for a right to refuse medication:

[T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection . . . [T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right . . . The only part of the conduct of anyone, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.

Wayne McCormick, *Property and Liberty—Institutional Competence and the Functions of Rights*, 51 WASH. & LEE L. REV. 1, 5 (1994) (quoting JOHN S. MILL, ON LIBERTY 9 (Rapaport ed. 1978) (1859)).

Former Chief Justice Warren Burger addressed this topic when he sat on the Court of Appeals for the District of Columbia. He noted that the right to remain free from governmental interference derives in part from Justice Brandeis’ dissent in *Olmstead v. United States*, 277 U.S. 438 (1928), in which Justice Brandeis recognized that “[t]he markers of our Constitution\* \* \* sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the Government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized man.” Application of President & Directors of Georgetown College, Inc., 331 F.2d 1010, 1016-17 (D.C. Cir. 1964) (Burger, J., dissenting) (quoting *Olmstead*, 277 U.S. at

A psychiatric hospital has the means for protecting against individuals with dangerous tendencies, such as placing the patients on more restrictive wards. Consequently, a patient poses a sufficient danger as to warrant the forced administration of medication only when he creates an emergency within the hospital.<sup>451</sup> Significantly, in *Riggins v. Nevada*,<sup>452</sup> the Supreme Court, relying in part on the civil commitment case of *Addington v. Texas*,<sup>453</sup> noted that the state would have satisfied due process if, *inter alia*, medication was necessary for the safety of the patient or others.<sup>454</sup>

Likewise, as the New York Court of Appeals recognized when interpreting the New York Constitution, state interests indigenous to a hospital setting, such as preserving time and resources of hospital staff, increasing the process of deinstitutionalization and maintaining the ethical integrity of the medical profession should not outweigh an individual's interest in refusing drugs.<sup>455</sup> While the New York Court of Appeals summarily reached this conclusion in a footnote, the court made the right decision. Medical ethics is simply not a

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478 (Brandeis, J., dissenting)). Justice Burger went on to add that “[n]othing in this utterance suggests that Justice Brandeis thought an individual possessed these rights only as to *sensible* beliefs, *valid* thoughts, *reasonable* emotions, or *well-founded* sensations. I suggest he intended to include a great many foolish, unreasonable and even absurd ideas which do not conform, such as refusing medical treatment even at great risk.” *Id.* at 1017 (emphasis added). If nothing else, the right to be left alone encompasses the right to forego treatment deemed medically necessary if one is willing to suffer the consequences. This may require some patients to choose between prolonged confinement without medication or discharge into the community under a treatment regimen that will produce debilitating physical consequences. *See supra* notes 78-128 and accompanying text.

451. *See In re K.K.B.*, 609 P.2d 747, 751 (Okla. 1980); *Rogers I*, 478 F. Supp. 1342, 1369 (D. Mass 1979); Opinion of the Justices, 465 A.2d 484, 489-90 (N.H. 1983).

452. 504 U.S. 127 (1992).

453. 441 U.S. 418 (1979).

454. *Riggins*, 504 U.S. at 135.

455. *See Rivers v. Katz*, 495 N.E.2d 337, 334 n.6 (N.Y. 1986). One authority argues that the interests of other patients in control of another patient's crazy behavior justifies the forcible administration of medication. *See Clayton, supra* note 25, at 29 n.99 (citing STONE, LAW, PSYCHIATRY & MORALITY 153-154 (1984)). Courts would very likely reject such an assertion. First, when any non-refusers create an emergency situation and pose a danger to other patients, the state can override the refusers right to refuse. *See supra* note 410 and accompanying text. Second, the behavior of refusers within a hospital setting should not significantly interfere with the treatment provided to other patients. Staff can isolate disruptive, nondangerous refusers. This should not unduly utilize clinical resources and such patient care could be undertaken with direct care staff who are non-professionals. Indeed, as refusers will generally want less contact with professional staff, these individuals enable treating physicians to spend more time with other patients. Finally, all involuntarily hospitalized patients are so mentally ill that they require in-patient hospitalization because they pose a risk of danger to themselves or others. *See supra* note 395 and accompanying text. Is Dr. Stone suggesting that the very crazy have a constitutional interest in not being subject to the intrusive nature of the very, very crazy while receiving their milieu therapy that will help make them better and such interest outweighs the right to bodily autonomy?

particularly strong interest and is subordinate to a patient's desires.<sup>456</sup> The process of deinstitutionalization is related to both the state's interest in conserving staff resources and lessening the financial burden since the government would theoretically have a smaller hospital population. However, when assessing constitutional rights, a state's financial interest is simply not sufficiently compelling to justify an infringement of the right to bodily autonomy.<sup>457</sup> Similarly, while the state has an interest in conserving its limited mental health resources,<sup>458</sup> for numerous reasons this interest does not outweigh an individual's interest in self-determination. There are few, if any, more firmly entrenched rights within our constitutional system of government than a person's right to control his or her own course of treatment regardless of the consequences.<sup>459</sup> Furthermore, because many patients are treatment resistant,<sup>460</sup> it is simply constitutionally indefensible to subject all individuals to the potentially disabling effects of medication. The Constitution incorporates higher values than governmental efficiency.<sup>461</sup>

Moreover, it is unclear whether the forcible administration of medication furthers the government's interest in conserving its limited facilities. As one court found after the state instituted a right to refuse medication, "the recognition of the right has [not] had any adverse effects on the operation of the institution or on its treatment goals."<sup>462</sup> In another state hospital that instituted a right to refuse policy, treatment improved without hospital personnel suffering substantial additional burdens.<sup>463</sup>

Further, overriding a patient's right to refuse does not guarantee provision of successful treatment since the ability of state-operated psychiatric systems to provide adequate diagnosis and treatment is questionable.<sup>464</sup> It is generally

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456. *See supra* note 438 and accompanying text.

457. *Cf. Shapiro v. Thompson*, 394 U.S. 618, 633 (1969) (limiting welfare costs is not a "constitutionally permissible state objective"); *Ake v. Oklahoma*, 470 U.S. 68, 78-79, (1985) (state economic interest insufficient to justify denial of psychiatric assistance).

458. *See Parham v. J.R.*, 442 U.S. 584, 604-05 (1979).

459. *See supra* notes 359-63 and accompanying text.

460. *See supra* note 65 and accompanying text.

461. *See, e.g., Goldberg v. Kelly*, 397 U.S. 254, 265-66 (1970); *see also Cooper v. Oklahoma*, 116 S. Ct. 1373, 1383 (1996). Admittedly, the fiscal and administrative burdens that a state faces are relevant to assessing what procedural protections the government must provide when it seeks to abridge a constitutionally protected liberty or property interest. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). However, a significant difference exists between incorporating the governmental interest in administrative efficiency when delineating procedural protections for *any* protected interest, such as a state job or a public entitlement, and permitting the governmental interest in administrative efficiency to justify subjecting patients to the potentially disabling and life-threatening effects of antipsychotic drugs.

462. *Davis*, 506 F. Supp. at 937 n.31.

463. Alexander D. Brooks, *The Constitutional Right to Refuse Antipsychotic Medication*, 8 BULL. AM. ACAD. PSYCHIATRY & L. 179, 213 (1980).

464. *See supra* notes 74-75 and accompanying text. *See also Ake v. Oklahoma*, 470 U.S. 68,

recognized that an antagonistic relationship between a patient and his doctor lessens the likelihood of clinical progress. A right to refuse encourages cooperation between a patient and his doctor and provides a far greater opportunity to receive treatment in which both the patient and physician concur.<sup>465</sup>

Furthermore, a right to refuse should not significantly impact hospital resources since the overwhelming percentage of patients do not refuse medication.<sup>466</sup> Additionally, to the extent that a limited number of treatment refusals resulted in patients remaining confined for periods of time longer than they would have if hospital staff forcibly administered medication, state statutes permit state hospitals to assess care and treatment charges.<sup>467</sup>

Finally, a patient's right to make decisions that some deem foolish does not leave the state powerless to act when the severity of the patient's psychosis precludes assessment of the risks and benefits of choosing medication. Hence, just as most states aim to treat civilly committed patients like its "normal" citizens by permitting involuntarily hospitalized patients to retain their civil rights,<sup>468</sup> states can obtain determinations of incompetence that enable hospitals to obtain judicial authorization to provide treatment over objection. This is similar to what general hospitals can do for incompetent patients who are not

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81 (1985); *Addington v. Texas*, 441 U.S. 418, 429 (1979) (recognizing the "lack of certainty and the fallibility of psychiatric diagnosis"); *Ennis & Litwack, supra* note 74, at 711-17; *Lipton & Simon, supra* note 74, at 370; *John Petrila, Redefining Mental Health Law*, 16 L. & HUMAN BEHAV. 89, 93 (1992) (recognizing diagnostic difficulties in state-operated psychiatric hospitals) (citations omitted).

465. See Paul S. Appelbaum & Thomas G. Gutheil, *Drug Refusal: A Study of Psychiatric Inpatients*, 137 AM. J. PSYCHIATRY 340, 345 (recognizing clinical value of negotiation between doctor and patient that results from a right to refuse); *Brooks, supra* note 47, at 369; *Morris, supra* note 227, at 354 n.54 (finding that the legal right to refuse model resulted in a clinical benefit to patients as it created an effective therapeutic alliance between doctor and patient).

466. See, e.g., J. Richard Ciccone et al., *Medication Refusal and Judicial Activism: A Reexamination of the Effects of the Rivers Decision*, 44 HOSP. & COMMUNITY PSYCHIATRY 555, 557 (1993); J. Richard Ciccone et al., *Right to Refuse Treatment: Impact of Rivers v. Katz*, 18 BULL. AM. ACAD. PSYCH. LAW 203, 208 (1990); Julie Zito et al., *One Year Under Rivers: Drug Refused in a New York State Psychiatric Facility*, 12 INT. J. LAW & PSYCH. 295, 302 (1989).

467. See, e.g., N.Y. MENTAL HYG. LAW § 43.01 (McKinney 1996). Courts have invariably recognized that states may impose care and treatment charges and have rejected any challenges to statutorily imposed care and treatment charges to civilly committed patients. See, e.g., *In re Nichols*, 388 N.W.2d 682 (Mich. Ct. App. 1986); *Chill v. Mississippi Hosp. Reimbursement Comm'n*, 429 So. 2d 574 (Miss. 1983); *Oklahoma ex rel. Western State Hosp. v. Stoner*, 614 P.2d 59 (Okla. 1980). Indeed, litigation throughout the country reveals that many states appropriate patients' Social Security benefits, sometimes illegally, to satisfy care and treatment charges. See, e.g., *Crawford v. Gould*, 56 F.3d 1162, 1165-68 (9th Cir. 1995); *King v. Schafer*, 940 F.2d 1182 (8th Cir. 1991).

468. See *supra* note 409 and accompanying text.

civilly committed.<sup>469</sup> Subjecting civilly committed patients to a state's incompetency laws permits patients to make seemingly unwise decisions as long as such individuals can weigh the risks and benefits of any decision to reject medication.<sup>470</sup>

### *E. Medication as the Least Intrusive Means of Treatment*

1. *An Historical Overview*.—Even when medication is necessary to satisfy the state's overriding interests, namely, controlling hospital emergencies and treating patients found incompetent to make treatment decisions, the need for such medication may not justify the forcible administration of antipsychotic medication. Rather, because forced drugging abridges a patient's fundamental right to bodily autonomy, due process requires that the drugs be the least restrictive means of satisfying the state interest in question.<sup>471</sup>

The Supreme Court first formulated the least intrusive means test in *Shelton v. Tucker*,<sup>472</sup> when it declared that,

even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.<sup>473</sup>

After *Shelton v. Tucker*, numerous courts applied the least restrictive alternative test to the civil commitment setting or other contexts involving psychiatric

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469. See *Woodland v. Angus*, 820 F. Supp. 1497, 1514 n.20 (D. Utah 1993); see also *Guardianship of Collier*, 653 A.2d 898 (Me. 1995).

470. As one authority noted:

At issue in deciding whether to respect a person's hospitalization and treatment refusal in his decisionmaking competence, that is, the person's ability, within reasonable, culturally determined limits, to attend to and weigh data relevant to the decision whether to accept or reject hospitalization and treatment. This type of determination focuses on the person's ability to perform the process of deciding rather than on the final decision. Focusing on this process avoids the logical fallacy of assuming that because a decision seems inexplicable, disturbing, or irrational in a given instance or series of instances, it must be true that the decisionmaker is incapable of rational decisionmaking.

Stephen J. Morse, *Crazy Behavior, Morals, and Science: An Analysis of Mental Health Law*, 51 SO. CAL. L. REV. 527, 632-633 (1978) (footnotes omitted).

471. See *Riggins v. Nevada*, 504 U.S. 127, 135 (1992).

472. 364 U.S. 479 (1960).

473. *Shelton*, 364 U.S. at 488 (footnotes omitted). Subsequently, the Supreme Court was more explicit: “[E]ven when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty,’ and we have required that States adopt the least drastic means to achieve their ends.” *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 185 (1979) (quoting *Kusper v. Pontikes*, 414 U.S. 51, 58-59 (1973)).

hospitalization.<sup>474</sup> A few courts, at least prior to *Youngberg v. Romeo*,<sup>475</sup> applied the least restrictive alternative in the refusal of treatment context.<sup>476</sup>

However, after *Youngberg*, a number of courts, relying on that case, held there is no right to receive treatment in the least restrictive environment,<sup>477</sup> thereby, at least implicitly, rejecting the applicability of the least restrictive alternative to any aspect of treatment in an institutional setting for people with mental disabilities. Similarly, after the Supreme Court's remand in *Rennie IV*, a majority of the Third Circuit failed to address whether the forced administration of medication abridges a fundamental right and concluded that the least restrictive alternative test does not survive *Youngberg*.<sup>478</sup> However, both *Riggins v. Nevada*<sup>479</sup> and a recognition that the right to refuse is fundamental strongly suggest that the least restrictive alternative governs the administration of psychotropic medication as the Supreme Court has applied the least restrictive alternative analysis in numerous other contexts in which fundamental liberties were at stake.<sup>480</sup>

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474. See, e.g., *DeAngelas v. Plaut*, 503 F. Supp. 775, 780-81 (D. Conn 1980) (holding state statute unconstitutional because of failure to require less restrictive alternatives); *Lynch v. Baxley*, 386 F. Supp. 378, 392 (M.D. Ala. 1974) (holding burden rests with state to demonstrate that proposed commitment is the least restrictive environment consistent with the person's needs); *Lessard v. Schmidt*, 349 F. Supp. 1078, 1096 (E.D. Wisc. 1972) (stating "person recommending full-time involuntary hospitalization must bear the burden of proving (1) what alternatives are available; (2) what alternatives were investigated; and (3) why the investigated alternatives were not deemed suitable"), vacated on the grounds, 414 U.S. 473, reinstated and enforced, 379 F. Supp. 1376 (E.D. Wisc. 1974), vacated on the grounds, 421 U.S. 957 (1975) reinstated, 413 F. Supp. 1318 (E.D. Wisc. 1976); *Covington v. Harris*, 419 F.2d 617, 623 (D.C. Cir. 1969) (noting the "principle of least restrictive alternative consistent with the legitimate purposes of a commitment inheres in the very nature of civil commitment"); *Lake v. Cameron*, 364 F.2d 657, 659-61 (D.C. Cir. 1966) (finding court has duty to explore alternatives to institutional confinement).

475. 457 U.S. 1119 (1982).

476. See *Rennie III*, 653 F.2d 836, 845-47 (3d Cir. 1981); *Rogers II*, 634 F.2d 650, 657 (1st Cir. 1980).

477. See, e.g., *Jackson v. Fort Stanton Hosp. & Training Sch.*, 964 F.2d 980, 992 (10th Cir. 1992); *Lelsz v. Kavanagh*, 807 F.2d 1243, 1251 (5th Cir. 1987); *Society for Good Will to Retarded Children v. Cuomo*, 737 F.2d 1239, 1249 (2d Cir. 1984).

478. See *Rennie V*, 720 F.2d 266, 269-70 (3d Cir. 1983). However, one court has rejected the applicability of *Youngberg* to the refusal of treatment context and has concluded that since the least restrictive alternative test applies whenever the state seeks to interfere with fundamental liberties, hospital staff must rule out less restrictive alternatives, such as segregation or use of less potent medication, prior to administering medication over objection to a pretrial detainee hospitalized because of an incapacity to stand trial. *Bee v. Greaves*, 744 F.2d 1387, 1396 (10th Cir. 1984).

479. 504 U.S. 127 (1992).

480. See, e.g., *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972) (right to vote); *Shapiro v. Thompson* 394 U.S. 618, 637 (1969) (right to interstate travel).

*Riggins* is also consistent with decisions based upon state law that have held that least

2. *Evaluating the Least Restrictive Alternative in Practice.*—The least restrictive alternative has frequently been viewed with hostility in the context of the provision of treatment to mentally ill individuals, particularly by the medical profession.<sup>481</sup> Generally, such criticism focuses on the difficulty in determining what constitutes the least restrictive method of treatment.<sup>482</sup>

However, once one recognizes that a right to refuse treatment exists except in an emergency or when a patient has been found incompetent to make treatment decisions, application of the least restrictive method of treatment in some respects is particularly easy to apply. When administering medication to eliminate an emergency, twenty-five milligrams of a drug is less restrictive than fifty milligrams, fifty milligrams is less restrictive than one hundred, and so forth. Likewise, a drug that is not an antipsychotic, such as Ativan,<sup>483</sup> which produces less debilitating side effects than antipsychotic drugs, constitutes a less restrictive form of treatment.<sup>484</sup>

Arguably, hospital staff may have difficulty assessing whether the administration of medication, either antipsychotic medication or a less potent type of psychotropic drug, is less restrictive than other treatment or behavioral

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restrictive alternative considerations govern the forced drugging of patients. *See* *Rogers v. Commissioner of Dep't of Mental Health*, 458 N.E.2d 308, 321 (Mass. 1983); *Rivers v. Katz*, 495 N.E.2d 337, 344 (N.Y. 1986).

Utilization of the least restrictive alternative rule in the refusal of treatment context does not mean that case law rejecting the least restrictive alternative in the context of the right to treatment is now bad law. Rather, as the right to refuse treatment is a fundamental right and hence, qualitatively different than the right to treatment, *see supra* notes 236-38 and 344-79 and accompanying texts, application of the least restrictive alternative in the refusal of treatment context does not mean that the least restrictive alternative analysis governs right to treatment cases.

481. *See, e.g.*, Thomas G. Gutheil et al., *The Inappropriateness of "Least Restrictive Alternative" Analysis for Involuntary Procedures with the Institutionalized Mentally Ill*, 22 J. PSYCHIATRY & LAW. 7 (1983); P. Browning Hoffman & Lawrence L. Foust, *Least Restrictive Treatment of the Mentally Ill: A Doctrine in Search of Its Senses*, 14 SAN DIEGO L. REV. 1100 (1977). For a more benign view of this doctrine, see Ingo Keilitz et al., *Least Restrictive Treatment of Involuntary Patients: Translating Concepts into Practice*, 29 ST. LOUIS U. L. REV. 691 (1985).

482. *See* *Romeo v. Youngberg*, 644 F.2d 147, 180 (Seitz, C.J., concurring); Gutheil et al., *supra* note 481, at 15; Hoffman & Foust, *supra* note 481, at 1150 n.142. Hoffman utilizes the following hypothetical situation to illustrate the difficulty in determining what constitutes the least restrictive treatment. A physician can treat a psychotic patient more quickly and efficiently with an intermuscular injection of medication that may produce severe side effects. On the other hand, the clinician can use oral medicine that might produce less side effects but require the patient to remain hospitalized for an appreciably longer period of time. *Id.*

483. Ativan is an antianxiety drug with sedative effects. PHYSICIANS DESK REFERENCE 3011, 3013 (52d ed. 1998).

484. Admittedly, in an emergency, a physician may well need to write an order that authorizes the administration of medication that comes in injectable form as it may not be possible, at least in some situations, to ask a patient whether he is willing to accept medication that can be given only orally. However, a drug such as Ativan can be administered by injection. *Id.* at 3011.

modalities such as seclusion or restraint.<sup>485</sup> Hospital staff can lessen this difficulty by asking patients during the admission process what type of emergency intervention they would prefer if such action becomes necessary.<sup>486</sup> Alternatively, patients can sign an advanced directive that specifies the type of forced intervention they would want hospital staff to administer if their clinical condition deteriorates to such a degree that they are creating an emergency on the ward.<sup>487</sup>

When administering treatment over objection to patients deemed incompetent to make their own treatment decisions, application of the least restrictive alternative should be no more difficult. Hospital physicians can attempt to determine the types of drugs that in the past produced any harmful side effects and not use such medications in any treatment regimen. Physicians can gather such information from the hospital record that should contain the patients' clinical histories.

Furthermore, use of the least restrictive alternative will not result in the involvement of the federal judiciary in the treatment plans of many patients, a concern that led to the adoption of the professional judgment standard in *Youngberg*.<sup>488</sup> Procedural due process requires that an independent factfinder of some sort determine whether a patient is incompetent to make treatment decisions.<sup>489</sup> At the same time, the independent factfinder could also determine what constitutes the least intrusive mode of treatment. Hence, whether a state court, an administrative official or administrative panel serves as the independent factfinder,<sup>490</sup> the presence of an independent decision maker should eliminate individual challenges in federal court.<sup>491</sup>

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485. Restraint has been defined as "the use of any apparatus that interferes with the free movement of the patient and which the patient is unable to remove easily." N.Y. COMP. CODES R. & REGS. tit. 14, § 27.2(d) (1995). Seclusion is "the presence of a patient in a room alone with closed door which is not possible for the patient to open from the inside. *Id.* § 27.2(e). In one study involving patients at a county psychiatric hospital, 64% of the patients preferred medication and 36% preferred seclusion or restraint as a means of intervention when necessitated by a clinical emergency. *Yvette Sheline & Teresa Nelson, Patient Choice: Deciding Between Psychotropic Medication and Physical Restraints in an Emergency*, 21 BULL. AM. ACAD. PSYCHIATRY & LAW 321, 324 (1993).

486. See Sheline & Nelson, *supra* note 485, at 327.

487. In *In re Rosa M.*, 597 N.Y.S.2d 544 (Sup. Ct. N.Y. Cty. 1991), the court denied an application from a psychiatric hospital to administer electro-convulsive therapy to an incompetent patient. The court recognized that when competent, the patient withdrew her consent to the treatment. *Id.* at 545. Accordingly because the patient had a fundamental right to control her own treatment, the hospital was prohibited from administering electro-compulsive therapy, even when she became incompetent. *Id.*

488. See *supra* notes 242-43 and accompanying text.

489. See *Washington v. Harper*, 494 U.S. 210, 233 (1990).

490. Compare *Rivers v. Katz*, 495 N.E.2d 337, 343-44 (N.Y. 1986), with *R.A.J. v. Miller*, 590 F. Supp. 1319, 1322 (N.D. Tex. 1984).

491. See *University of Tenn. v. Elliott*, 478 U.S. 788, 799 (1986); *Migra v. Warren City Sch.*

#### *F. State Law as a Basis for a Federal Right to Refuse Medication*

Perhaps the most significant aspect of *Washington v. Harper*<sup>492</sup> is the Supreme Court's explicit recognition that state law can serve as a source of a federal right to refuse medication independent of any right conferred by the Due Process Clause of the Fourteenth Amendment itself.<sup>493</sup> The Supreme Court has never squarely addressed the issue of whether state-created liberty interests are protected by both the substantive and procedural components of the Due Process Clause or only require procedural protection.<sup>494</sup> However, the Court's opinion in *Harper* strongly substantiates that state law can create a substantive liberty interest that defines the scope of one's essential right to refuse medication.

In *Harper*, the Court noted that state law creates a protected liberty interest and determines "what factual circumstances must exist before the State may administer antipsychotic drugs."<sup>495</sup> This occurs when state law uses language of an unmistakably mandatory character prohibiting governmental conduct absent specified substantive predicates.<sup>496</sup> When state law limits the forcible administration of medication to certain specified circumstances, state law creates a justifiable expectation that the government will not administer medication unless those circumstances exist.<sup>497</sup>

In concluding in *Harper* that the prisoner possessed a liberty interest in refusing medication except if he is mentally ill and either gravely disabled or dangerous,<sup>498</sup> the Court cited *Hewitt v. Helms*,<sup>499</sup> and *Vitek v. Jones*.<sup>500</sup> This is noteworthy because these cases examined state created liberty interests by virtue of the mandatory nature of state law. The Court did not cite *Rogers III*, *Rennie IV*, or *Youngberg*, cases that one would expect to serve as authority for a

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Dist. Bd. of Educ., 465 U.S. 75, 81 (1984).

492. 494 U.S. 210 (1990).

493. *See id.* at 221-22.

494. Former Justice Powell believes that "substantive due process rights are created only by the Constitution. Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 229 (1985) (Powell J. concurring). Similarly, relying upon Justice Powell's concurrence in *Ewing*, the Fourth Circuit concluded that "substantive due process rights arise solely from the Constitution." *Huang v. Board of Governors of Univ. of N.C.*, 902 F.2d 1134, 1142 n.10 (4th Cir. 1990). The Eleventh Circuit also reached the same conclusion. *See McKinney v. Pate*, 20 F.3d 1550, 1556 (11th Cir. 1994) (en banc), *cert. denied*, 115 S. Ct. 898 (1995). On the other hand, the Seventh Circuit concluded that the Due Process Clause protects substantive liberty interests created by state law. *See Villanova v. Abrams*, 972 F.2d 792, 798 (7th Cir. 1992).

495. *Harper*, 494 U.S. at 220.

496. *Id.* at 220-21.

497. *Id.* at 221.

498. *Id.*

499. 459 U.S. 460, 471-72 (1983).

500. 445 U.S. 480, 488-91 (1980).

substantive right to refuse medication.<sup>501</sup> Hence, the opinion states that state law defined the scope of the prisoner's right to refuse.<sup>502</sup> This is evident in the Court's opinion addressing the prisoner's substantive right to refuse medication under the Due Process Clause in the absence of any state-created liberty interest. The Court also held that "the Due Process Clause confers upon the respondent no greater right than that recognized under state law."<sup>503</sup>

Because state law of a mandatory nature defines the scope of a patient's right to refuse medication, a broad constitutional right to refuse drugs exists in many jurisdictions. In most states, there is a common law right to determine one's

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501. *See Harper*, 494 U.S. at 221. One can argue that *Harper* does not necessarily establish that state law can always create substantive liberty interests. Rather, the refusal of treatment context presents a situation in which substantive protections exist independent of state law as a result of the historic protections to the right to bodily autonomy. If, as the Court in *Rogers III* suggested, state law governs the weight to accord the competing interests of the individual and the state, 457 U.S. 291, 304 (1982), then state law does not create substantive interests but simply helps define the scope of the right that arises independently under the Federal Constitution. *See id.* However, such an interpretation of *Harper* is not necessarily consistent with dicta from *Rogers III* in which the Court noted that "substantive liberty interests [can be] created by state as well as federal law." *Id.* at 300.

502. In addressing the scope of Mr. Harper's right to refuse drugs, the Court recognized that its grant of *certiorari* included a review of both "the substance of the inmate's right, as well as the procedural guarantees." *Harper*, 494 U.S. at 220-21. The Court then stated that "[w]e address these questions beginning with the substantive one." *Id.* at 221. The Court then concluded that "state law recognizes a liberty interest . . . which permits refusal of antipsychotic drugs unless certain preconditions are met," *id.* at 228, and rejected the prisoner's contention that the State's "substantive standards are deficient under the Constitution." *Id.* at 227. At this point in its opinion, the Court stated that "we address next what procedural protections are necessary to ensure that the decision to medicate an inmate against his will is neither arbitrary nor erroneous under the standards we have discussed above." *Id.* at 228. Hence, the portion of the opinion that addressed the prisoner's rights as defined by state law addressed the substantive aspect of the right to refuse.

503. *Id.* at 222. This sentence must be interpreted as a comparison between rights under the Due Process Clause itself and state created liberty interests that are also protected by the Fourteenth Amendment. It cannot be interpreted as a comparison rights protected by the Fourteenth Amendment and rights protected only under state law. Because the Eleventh Amendment prohibits a federal court from enjoining state officials in order to protect rights under state law, *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 87, 117 (1984) it would have been fruitless for the Court to engage in any discussion about rights that were not subject to review by the Supreme Court under state law itself.

Ultimately, one can argue that because the Supreme Court ruled that the prisoner's right to refuse drugs was no greater than what was guaranteed to him under state law, the Court was willing to assume that state law created substantive rights. While this is true, one must ask why the Court explicitly stated that it was addressing the prisoner's substantive due process rights if it did not believe that state law could create substantive rights. Indeed, in *Collins v. City of Harker Heights*, when the Court wanted to assume the existence of a substantive interest created by state law, the Court explicitly stated so. 503 U.S. 115, 129 (1992).

course of treatment that permits individuals to refuse medical treatment in non-emergency situations.<sup>504</sup> This common law right can serve as a basis for a state created liberty interest.<sup>505</sup> This common law right does not necessarily serve as a source of protection for institutionalized mentally ill individuals. In virtually every state, citizens do not forfeit any civil right as a result of involuntary hospitalization or the receipt of services for mental health.<sup>506</sup> Furthermore, in most states, notwithstanding any civil commitment, patients remain competent as a matter of law.<sup>507</sup> Accordingly, the combination of the common law right to determine one's course of treatment and state statutory laws that provide that patients (1) do not forfeit any civil rights upon civil commitment or receipt of services of mental illness, and (2) remain competent notwithstanding civil commitment, creates in many jurisdictions a justifiable expectation that patients can choose whether or not to accept medication in non-emergency situations or when they have been found to be incompetent.<sup>508</sup>

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504. *See, e.g., supra* note 361 accompanying text; *Common Law Remedy*, *supra* note 11, at 1736-37.

505. *See* Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 224 n.9 (1985); *Rennie III*, 653 F.2d at 841-42.

506. *See supra* note 409 and accompanying text.

507. *See* ARK. CODE ANN. § 20-47-223 (Michie 1991); CAL. WELF. & INST. CODE § 5331 (West 1992 & Supp. 1998); COLO. REV. STAT. § 27-10-104 (1997); CONN. GEN. STAT. ANN. § 17a-541 (West 1988); D.C. CODE ANN. § 21-564 (1989); FLA. STAT. ANN. § 394.459(1) (West 1986); 405 ILL. COMP. STAT. ANN. 5/2-101 (West 1997); IND. CODE ANN. § 12-27-2-3 (1993); IOWA CODE ANN. § 229.27 (West 1994 & Supp. 1998); KAN. STAT. ANN. 59-2948(b) (West 1997); LA. REV. STAT. ANN. § 171B (West 1989 & Supp. 1998); ME. REV. STAT. ANN. tit. 34-B, § 3803(1) (West 1988); MASS. GEN. LAWS ANN. ch. 123, § 24 (West 1998); MICH. COMP. LAWS ANN. § 330.1489 (West 1992); MISS. CODE ANN. § 41-21-101 (Michie 1993); MO. ANN. STAT. § 630.120 (West 1988); MONT. CODE ANN. § 53-21-141 (1997); NEB. REV. STAT. § 83-1066(1) (1994); NEV. REV. STAT. ANN. § 433A.460 (Michie 1996 & Supp. 1997); N.H. REV. STAT. ANN. § 135-C:56(II) (1996); N.J. STAT. ANN. § 30:4-24.2(c) (West 1997); N.M. STAT. ANN. § 43-1-5 (Michie 1997); N.Y. MENTAL HYG. LAW § 29:03 (McKinney 1996); N.C. GEN. STAT. § 122C-203 (1996); N.D. CENT. CODE § 25-03.1-33 (1995); OHIO REV. CODE ANN. § 5122.301 (Anderson 1996); OKLA. STAT. ANN. tit. 43A., § 1-105 (West 1990); OR. REV. STAT. § 426.295(1) (1995); S.C. CODE ANN. § 44-17-580(2) (Law Co-op 1985); TENN. CODE ANN. § 33-3-104(5) (1984 & Supp. 1997); VT. STAT. ANN. tit. 18, § 7706 (1987); VA. CODE ANN. § 37.1-87 (Michie 1996 & Supp. 1997); WASH. REV. CODE ANN. § 71.05.450 (West 1992 & Supp. 1998); W. VA. CODE § 27-5-9(a) (1992); WIS. STAT. ANN. § 51.59 (West 1987); WYO. STAT. ANN. § 25-10-121 (1997).

508. *See, e.g.*, *Goedecke v. State Dep't of Insts.*, 603 P.2d 123, 125 (Colo. 1979); *Rivers*, 495 N.E.2d at 344. Because both the right to refuse treatment that arises out of state-created liberty interests and the right conferred by the Fourteenth Amendment, as detailed in *Rogers III*, rest on the common law to determine the scope of one rights, *see supra* notes 421-34 and accompanying text, regardless of the approach taken, the result is the same. However, reliance upon the state-created liberty interest approach has one potential significant impact. When addressing rights arising out of state-created liberty interests, the Supreme Court has never adopted an institutional based standard of review to govern decisions by governmental officials. *See, e.g.*, *Harper*, 494 U.S.

However, many jurisdictions contain more specific statutory or administrative law governing the right to refuse medication; some limit the right to refuse, some do not.<sup>509</sup> In those jurisdictions that contain statutory law addressing the right to refuse medication, such statutory law may re-define a patient's right to refuse medication, and concomitantly impact the scope of a patient's state created liberty interest. Unambiguous statutory law can limit one's common law rights.<sup>510</sup> Furthermore, when statutory law governing medication conflicts with provisions that prohibit the forfeiture of civil rights and/or declare that patients remain competent, the former provisions will supersede the latter as rules of statutory construction provide that when a specific statute conflicts with laws of a more general nature, the specific statute controls.<sup>511</sup>

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at 221; *Hewitt v. Helms*, 459 U.S. 460, 466-72 (1983). Hence, if one rejects the author's contention that there should be no institutional standard of review when assessing rights under the Fourteenth Amendment itself, the use of a state-created liberty interest approach still affords patients a right to refuse that is defined by a patient's common law rights under state law.

509. *See, e.g.*, ARIZ. REV. STAT. ANN. §§ 36-512, 36-513 (West 1993) (right to refuse except in true medical emergency); CONN. GEN. STAT. ANN. § 17a-543(b) (West 1992 & Supp. 1998) (involuntary patients may be administered treatment over consent); FLA. STAT. ANN. § 394.459(3) (West 1998) (right to refuse except in emergency or after judicial determination of incompetence); GA. CODE ANN. § 37-3-163(b) (1995) (no right to refuse in emergency or later concurrence of need for treatment by second physician); HAW. REV. STAT. ANN. § 334E-1 (Michie 1996) (informed consent required before all treatment); IDAHO CODE § 66-346(4) (1996) (right to refuse specific modes of treatment); 405 ILL. COMP. STAT. ANN. 5/2-107, 5/107.1 (West 1997) (right to refuse except in emergency or under court order that finds patient exhibits deterioration, lacks capacity to make a reasoned treatment decision, benefits from medication outweigh the harm and other factors are present); IOWA CODE § 229.23(2) (West 1994) (no right to refuse after court order of commitment); KY. REV. STAT. ANN. §§ 202A.191; 202A.196 (Michie 1995) (right to refuse except if court orders otherwise after considering necessity of medication to protect against harm, the capacity of patient to give informed consent, the existence of less restrictive alternatives and risks of permanent side effects); NEV. REV. STAT. ANN. § 433.484 (Michie 1996) (right of competent individual to refuse except in emergency situation); N.C. GEN. STAT. § 122C-57(e) (1996 & Supp. 1997) (hospital may administer medication over objection in emergency, when involuntarily committed patient is incapable of participating in treatment plan, or significant possibility that patient will harm himself or others without treatment); N.H. REV. STAT. ANN. § 135-C:57 (1996) (right to refuse except in emergency situation); N.M. STAT. ANN. § 43-1-15 (Michie 1993) (right of competent adult to refuse treatment); S.C. CODE ANN. § 44-22-140 (Law Co-op & Supp. 1997) (right to refuse only psychiatric treatment that is not standard); S.D. CODIFIED LAWS § 27A-12-3.23 (Michie Supp. 1997) (hospital may administer medication over objection in an emergency to prevent serious physical harm to self or others or significant deterioration of mental illness); WIS. STAT. ANN. § 51.61(1)(g) (West 1997) (no right to refuse after commitment hearing).

510. NORMAN J. SINGER, 3 SUTHERLAND STATUTORY CONSTRUCTION § 61.01, at 171-73 (5th ed. 1992 & Supp. 1998).

511. *See, e.g.*, *Williams v. State Farm Mut. Auto. Ins. Co.*, 763 F. Supp. 121, 127 (E.D. Pa. 1991); *Gaynor v. Union Trust Co.*, 582 A.2d 190, 199 (Conn. 1990); *Wilson v. Unsatisfied Claim*

However, any state law that limits a patient's common law right to control his or her own course of treatment must clearly limit such right as it is also a well-settled rule of statutory interpretation that statutes in derogation of the common law will be strictly construed and any limitation of one's common law right must be clearly set forth.<sup>512</sup> Similarly, in jurisdictions where there are administrative regulations governing the right to refuse, the administrative regulations will not limit one's state-created liberty interest since government agencies may only promulgate those regulations that are consistent with statutory law.<sup>513</sup> Accordingly, in jurisdictions that provide for a common law right to determine one's treatment and have statutory provisions regarding competency and the maintenance of civil rights, administrative regulations that limit a patient's common law right to determine his or her own course of treatment are invalid. Such administrative regulations impermissibly conflict with state statutory law because the regulations result in a patient forfeiting his or her common law right to determine his or her own course of treatment even though the patient remains competent as a matter of law.<sup>514</sup>

### CONCLUSION

An analysis of the Supreme Court's decisions in *Washington v. Harper*<sup>515</sup> and *Riggins v. Nevada*<sup>516</sup> establishes that it is an error to apply the professional judgment standard of *Youngberg v. Romeo*<sup>517</sup> to cases involving the forcible

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and Judgment Fund, 536 A2d 752, 756 (N.J. 1988); *State v. Stephens*, 807 P.2d 241, 245 (N.M. Ct. App. 1991); *People v. Lawrence*, 474 N.E.2d 593, 596, 204 (N.Y. 1984); *Hammond v. City of Dallas*, 712 S.W.2d 496, 498 (Tex. 1986); *Paternity of J.S.C. v. T.L.G.*, 400 N.W.2d 48, 55 (Wis. Ct. App. 1986).

512. See, e.g., *Pigford v. People*, 593 P.2d 354, 356 (Colo. 1979); *Blue Cross & Blue Shield of Conn., Inc. v. Mike*, 439 A.2d 1026, 1032 (Conn. 1981); *Heard v. Neighbor Newspapers, Inc.*, 383 S.E.2d 553, 554 (Ga. 1989); *Burns Int'l Sec. Servs. v. Department of Transp.*, 671 P.2d 446, 449 (Haw. 1983); *Macku By and Through Macku v. Drackett Prods.*, 343 N.W.2d 21, 58, 61 (Neb. 1984); *Gancialves v. Regent Hotels*, 447 N.E.2d 693, 697 (N.Y. 1983); *Reliance Ins. Co. v. Chevron U.S.A., Inc.*, 713 P.2d 766, 770 (Wyo. 1986).

513. See, e.g., *Manhattan Gen. Equip. Co. v. Commissioner of Internal Revenue*, 297 U.S. 129, 134 (1936); *McComb v. Wambaugh*, 934 F.2d 474, 481 (3d Cir. 1991); *Shelton v. Mutual Sav. & Loan Ass'n*, 738 F. Supp. 1050, 1057 (E.D. Mich. 1990); *Ex parte State Dep't of Human Resources*, 548 So. 2d 176, 178 (Ala. 1988); *Natural Resources & Env'l. Protection Cabinet v. Pinnacle Coal Corp.*, 729 S.W.2d 438, 439 (Ky. 1987); *Parmley v. Missouri Dental Bd.*, 719 S.W.2d 745, 755 (Mo. 1986); *Smith v. North Dakota Workers Compensation Bureau*, 447 N.W.2d 250, 262 (N.D. 1989).

514. See *Rivers v. Katz*, 495 N.E.2d 337, 341 (N.Y. 1986) (invalidating state administrative provision because it resulting in forced administration of medication in violation of common law right to determine one's own course of treatment and state constitution).

515. 494 U.S. 210 (1990).

516. 504 U.S. 127 (1992).

517. 457 U.S. 1119 (1982).

administration of medication to civilly committed patients. Courts that applied the *Youngberg* standard erred because of their failure to (1) reconcile the Supreme Court's dispositions of *Rogers III* and *Rennie IV*, and (2) scrutinize the constitutional differences between refusing medication and providing care and treatment to a profoundly retarded individual. State courts have generally recognized a broad right to refuse under federal law.<sup>518</sup> However, the scope of a patient's right to refuse under federal law is inextricably tied to state law because state law (1) serves to guide the balancing of individual and state interests, and (2) creates protectable substantive interests. Litigants should no longer be afraid of federal courts as a mechanism to protect against the unwanted administration of medication and should invoke this forum when they believe it serves their clients' interests to do so.<sup>519</sup>

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518. See *supra* notes 22, 435 and accompanying text.

519. For a discussion of the factors to consider when deciding whether to file a civil rights lawsuit in federal and state court, see SCHWARTZ & KIRKLIN, *supra* note 307, §§ 1.17-1.18, at 64-68.



# HEALTH CARE INFORMATION TECHNOLOGY AND INFORMED CONSENT: COMPUTERS AND THE DOCTOR-PATIENT RELATIONSHIP

FRANCES H. MILLER\*

## INTRODUCTION

A few weeks ago, a thirty-five-year-old Connecticut man was stunned by his diagnosis—scleroderma—and even more stunned by his doctor's advice: "Whatever you do, don't check the Internet. It's not just that there's misinformation out there . . . . It's just that there are 100 different ways any disease can play out, but you will just have one. Let's not worry about the other 99."<sup>1</sup>

These first few sentences of a recent article in a major metropolitan newspaper produce a sense of *dejà vu*. Doctors sounded this same paternalistic note throughout the history of medicine until well into the twentieth century.<sup>2</sup> Since medicine could do precious little until then to affect the course of patient illness, physicians protected patients from the unpleasant truths associated with disease to avoid impairing whatever possibilities existed for enjoying life.<sup>3</sup> Moreover, doctors have always recognized the placebo effect in medicine,<sup>4</sup> and

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This Article was the basis of Professor Miller's McDonald-Merrill-Ketcham Lecture presentation to faculty and other professionals on October 10, 1996 at the Indiana University School of Law—Indianapolis.

1. Judy Foreman, *It Is a Tangled Medical Web They Weave on Internet*, BOSTON GLOBE, Oct. 13, 1997, at C1.

2. The Hippocratic Oath, asking doctors to "swear by Apollo and Aesculapius that system of regimen which according to my ability and judgment I consider for the benefit of my patients," fosters this paternalism. Jay Katz, *Informed Consent—Must It Remain A Fairy Tale?*, 10 J. CONTEMP. HEALTH L. & POL'Y 69, 73-74 (1993).

3. "The life of a sick person can be shortened not only by the acts, but also by the words or the manner of a physician. It is . . . a sacred duty to guard himself carefully in this respect, and to avoid all things which have a tendency to discourage the patient and to depress his spirits." CODE OF ETHICS OF THE AMERICAN MEDICAL ASSOCIATION (May 1847) (Preliminary Note).

4. Howard Brody, *The Lie that Heals: The Ethics of Giving Placebos*, 97 ANNALS OF INTERNAL MED. 112 (1982); see also Joan-Ramon Laporte & Albert Figuera, *Placebo Effects in*

understand that many patients improve simply because a trusted authority figure reassures them they will.<sup>5</sup>

Only at mid-century when informed consent doctrine began to find expression as a negligence-based cause of action<sup>6</sup> did physicians start to alter the paternalistic way in which most disseminated information to their patients.<sup>7</sup> This legal development came relatively soon after such medical advances as the discovery of penicillin and the sulfa drugs, which for the first time permitted physicians to offer some real possibilities for curing illness.<sup>8</sup> Until informed consent acquired a negligence rationale, a doctor was legally required only to provide patients with sufficient information to avoid being charged with battery. There was no legal need to elaborate further on the risks and benefits of proposed therapy.<sup>9</sup>

These days motivated (and educated) patients have the means—thanks to sophisticated internet technology—to penetrate a prolific and bewildering maze of medical information efficiently.<sup>10</sup> Thus they can seek on their own to understand the scientific bases for their diseases, and the therapies their doctors prescribe to hold illness at bay. But just when laypeople have finally gained the ability to acquire medical information quickly and easily, some members of the

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*Psychiatry*, THE LANCET, Oct. 29, 1994, at 1206; Alan G. Johnson, *Surgery as Placebo*, THE LANCET, Oct. 22, 1994, at 1140; K.B. Thomas, *The Placebo in General Practice*, THE LANCET, Oct. 15, 1994, at 1066; D.M. Chaput de Saintonge & Andrew Herxheimer, *Harassing Placebo Effects in Health Care*, THE LANCET, Oct 8, 1994, at 995; Peter C. Gotzsche, *Is There a Logical Placebo?*, THE LANCET, Oct. 1, 1994, at 925.

5. W.R. Houston, *The Doctor Himself as Therapeutic Agent*, 11 ANNALS OF INTERNAL MED. 1415, 1418 (1938).

6. *Salgo v. Stanford, University Board of Trustees*, 317 P.2d 170 (Cal. App. 1957), was the first case to articulate “informed consent” terminology, but other landmark cases such as *Canterbury v. Spence*, 464 F.2d 772 (D.C. Cir. 1972) (establishing a patient-centered standard of required disclosure), followed relatively rapidly thereafter.

7. See generally JAY KATZ, THE SILENT WORLD OF DOCTOR AND PATIENT 1-29 (1984).

8. Ronald L. Desrosiers, *The Drug Patent Term: Longtime Battleground in the Control of Healthcare Costs*, 24 NEW ENG. L. REV. 115, 115 (1989).

9. Today physicians can still be liable for battery when they fail to secure consent of any sort for what they actually do, but these cases are relatively rare. Cf. *Chouinard v. Marjani*, 575 A.2d 238 (Conn. App. Ct. 1990) (defendant performed surgery on both of plaintiff’s breasts when she consented to surgery on only one).

10. Compare Bill Siwicki, *Software, Internet Create New Avenues for Patient Education*, HEALTH DATA MGMT., Jan. 19, 1997, available in 1997 WL 8747778 (discussing growth and value in patient education systems), with Marilyn Kennedy Melia, *And Remember: Be Careful Out There: A Healthy Dose of Skepticism When Researching Diseases and Health Conditions Yourself*, CHI. TRIB., Mar. 17, 1998, at 3, available in 1998 WL 28354476 (noting an increase in patient research on diseases). See also Robert L. Lowe, *Here Come Patients Who’ve “Studied” Medicine On-Line*, MED. ECON., Jan. 27, 1997, at 175, available in 1997 WL 1004660 (discussing ramifications of growth in on-line medicine); Janice Maloney, *Finding Some Warm Havens in the Web’s Information Blizzard*, N.Y. TIMES, June 21, 1998, at WH25.

medical profession have instinctively reacted by attempting to keep patients in the dark "for their own good."<sup>11</sup> The physician's comments which begin this Article exemplify such a bid to protect allegedly vulnerable and dependent sick people from potentially disturbing or misleading health care information.<sup>12</sup>

Such a paternalistic approach is a rear-guard action surely doomed to failure with today's (not to mention tomorrow's) increasingly computer-literate patients; the genie is well out of that bottle.<sup>13</sup> Physician paternalism under cover of patients' "best interests" cannot hope to contain it. A healthy respect for patient autonomy is firmly entrenched in the law relating to informed consent,<sup>14</sup> notwithstanding some recent legislative retrenchment at the margin,<sup>15</sup> and patients are becoming increasingly assertive and confident when it comes to computerized searches for medical information.<sup>16</sup> Moreover, the more farsighted members of the medical community are assisting them to become even more so, by helping patients to sort the wheat from the chaff among internet offerings.<sup>17</sup>

Harvard Medical School and the Beth Israel Hospital in Boston, for example, offer an annual continuing education course entitled "Cybermedicine: the Computer as a Patient's Assistant," based on the premise that patients are the largest and most under-utilized resource in health care.<sup>18</sup> Since an estimated 10,000 to 25,000 websites are now dedicated to health care issues,<sup>19</sup> there is no

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11. "It is the time-honored professional belief in the virtue of silence, based on ancient notions of a need for faith, reassurance, and hope, that the idea of informed consent seeks to question." KATZ, *supra* note 7, at xvii.

12. The same phenomenon can be observed among some British doctors as well. See *Web Quacks Add to GPs' Work load*, THE (LONDON) INDEP., Jan. 14, 1998, at 8.

13. More than 60 million people are now estimated to have internet access. R. Sikowski, *Digital Dialogue: Sharing Information and Interests on the Internet*, 277 JAMA 1258 (1997); Rebecca Quick, *CyberRx: Getting Medical Advice and Moral Support on the Web*, Apr. 30, 1998, WALL ST. J., at B10.

14. Justice Cardozo set forth the classic statement of the rationale in *Schloendorf v. Society of New York Hospitals*, 105 N.E. 92, 93 (N.Y. 1914) ("Every human being of adult years and sound mind has the right to determine what shall be done with his own body . . . ."). For an overview of U.S. law relating to informed consent, see Jon F. Merz, *Informed Consent Does Not Mean Rational Consent: Cognitive Limitations on Decision-Making*, 11 J. LEGAL MED. 321 (1990).

15. See, e.g., ALA. CODE § 6-5-484 (1990); ARIZ. REV. STAT. § 12-561(2)-563 (1990); NEV. REV. STAT. § 41A.100 (1991); TENN. CODE ANN. § 29-26-118 (1991) (asserting physician-oriented standards of disclosure).

16. See K.A. Hayes & C.U. Lehmann, *The Interactive Patient: A Multimedia Interactive Educational Tool on the World Wide Web*, 13 MD COMPUTING 330 (1996).

17. Alejaudro R. Jihad & Anna Gagliardi, *Rating Health Information on the Internet: Navigating to Knowledge or to Babel?*, 279 JAMA 611 (1998).

18. The Harvard Medical School website (located at <www.feltco.com/hmscme/>) lists current semester course offerings.

19. Foreman, *supra* note 1, at C1. An estimated 40% of the people who cruise the net use it for health information "at one point or another." *Id.* at C5.

dearth of on-line sources for patients to investigate.<sup>20</sup> Moreover, a patient need not be internet-savvy to take advantage of the information explosion technology has wrought.<sup>21</sup> Sophisticated electronic data collection and analysis techniques have made possible a far-greater understanding of disease, its causes, and the effectiveness of therapies, and this information is now much more accessible in written form as well. The law's deference to patients' rights to make their own medical decisions unquestionably extends to self-help regarding medical information-gathering, in whatever form.

Growing numbers of doctors are also taking advantage of their patients' increasing facility with the internet by initiating e-mail correspondence to communicate lab results and answer patient questions.<sup>22</sup> These dialogues purportedly help to restore the sense of physician-patient intimacy that managed care sometimes seems to erode.<sup>23</sup> The doctors find that e-mail's typically staccato form can save time, decrease patient anxiety, and increase patient compliance with therapy, but legal problems can lurk in the exchanges.<sup>24</sup> Some psychiatrists are also exploring the usefulness of e-mail in counseling their patients on-line.<sup>25</sup> (A cynic might observe that computerized counseling keeps sometimes-difficult patients at arm's length from the doctor as well.). On-line

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20. See, for example, <<http://www.ObGYN.net>>, a physician-reviewed service providing information about obstetrics and gynecology, which had almost 150,000 "hits" during March 1998, mainly from women between 20 and 55. The site has separate sections for consumers and medical professionals, and offers MedLine searches, an on-line library of journal articles, book announcements, web-only columns by physicians and hospital administrators, and on-line support groups, all at no charge to users.

21. The Foundation for Accountability (FACCT), a non-profit organization "dedicated to helping Americans make better health care decisions," has been a leader in developing consumer-focused quality measures and educating consumers about the availability and use of electronic and other sources of quality information. FACCT's quarterly Accountability Resource Series provides technical information and communication tools relating to consumer-focused quality measurement and accountability. Its website, <<http://www.facct.org>>, provides further information about its activities and resources. Geneva's Health on the Net Foundation, located at <<http://hon.ch>>, has developed a voluntary self-policing system for health-related websites, which permits them to display its seal of approval (HON) if the information on them is scientifically reputable. Watchdog groups like Science in the Public Interest also periodically review health-related websites and issue warnings when they discover misleading and inaccurate information.

22. Esther B. Fein, *For Many Physicians, E-Mail Is the High-Tech House Call*, N.Y. TIMES, Nov. 21, 1997, at 1.

23. See Beverley Kane & Daniel Sands, *Guidelines for the Clinical Use of Electronic Mail with Patients*, 5 J. AM. MED. INFORMATICS ASS'N 1, 104 (1998).

24. Alissa Spielberg, *On-Call & On-Line: The Socio-Historical, Legal and Ethical Implications of E-Mail for the Doctor-Patient Relationship* (unpublished manuscript). Cf. Colleen L. Rest, *Electronic Mail and Confidential Client-Attorney Communications: Risk Management*, 48 CASE W. RES. L. REV. 309 (1998).

25. Cameron Johnston, *Psychiatrist says Counseling Via E-Mail May Be Yet Another Medical Use for Internet*, 155 CAN. MED. ASS'N J. 1605 (1996).

services have been described as the “next transformation” in health care,<sup>26</sup> and the whole field of telemedicine can be considered a burgeoning industry on its own.<sup>27</sup>

At the beginning of 1998, the influential *Journal of the American Medical Association* (JAMA) issued a call for papers for a special Journal issue late in 1998 on computers and the internet in medicine. Noting that “the Web is being used to . . . inform and even counsel patients,” JAMA editors asked, “How should the patient-physician relationship evolve to exploit the seemingly unlimited and often unfiltered clinical information available to patients? Will physicians take on an enhanced role as counselors and educators in the course of so much information and misinformation?”<sup>28</sup> Organized medicine clearly understands the revolutionary potential for electronic data gathering and communication, and its capacity to affect physician-patient interaction in many profound ways. Although JAMA accepts that changes are inevitable, the tone of these rhetorical questions indicates apprehension about the negative possibilities stemming from patient access to internet information. That apprehension echoes the doctor’s protective sentiments with which this Article begins.

The Article advances the thesis that the internet and many other improvements in health care information technology are changing the kinds of knowledge patients—and many of their doctors—consider material to making decisions about health care.<sup>29</sup> In jurisdictions having a patient-centered standard of disclosure, providers cannot turn a blind eye to this fact, and should adapt their disclosure practices accordingly if they wish to avoid being charged with negligence.<sup>30</sup> Doctors in jurisdictions with provider-oriented standards of disclosure instead also need to modify the scope of their disclosures to reflect what they all must know their patients soon will, or could find out anyway.<sup>31</sup>

These patient-friendly technology advances could eventually change the common knowledge caregivers will be justified in assuming their patients already have—or reasonably should have. The ultimate question this raises is whether, as patient sophistication about using the internet accelerates, more of the burden

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26. Jerome Kassirer, *The Next Transformation in the Delivery of Healthcare*, NEW. ENG. J. MED., Jan. 5, 1995, at 52.

27. Cf. Christopher Guttman McCabe, *Telemedicine’s Imperilled Future? Funding, Reimbursement, Licensing and Privacy Hurdles Face a Developing Technology*, 14 J. CONTEMP. HEALTH L. & POL’Y 161 (1997).

28. Margaret A. Winker & William M. Silberg, *Computers the Internet, and the Practice of Medicine: A Call for Papers*, 279 JAMA 66 (1998).

29. See Neil B. Cohen & Aaron D. Twerski, *Comparing Medical Providers: A First Look at the New Era of Medical Statistics*, 58 BROOK. L. REV. 5 (1992) (comprehensive discussion of the impact of comparative provider statistics).

30. See, e.g., *Canterbury v. Spence*, 464 F.2d 772, 787 (1972) (“[a] risk is . . . material when a reasonable person, in what the physician knows or should know to be the patient’s position, would be likely to attach significance to the risk or cluster of risks in deciding whether or not to forego the proposed therapy.”).

31. *Wooley v. Henderson*, 418 A.2d 1123 (Me. 1980).

of acquiring information "material" to medical decision-making, whether in electronic or printed form, will shift to them. This would correspondingly relieve physicians of some level of obligation to disclose, because they would be justified in assuming greater patient knowledge about medical therapy. In one sense this could constitute the ultimate expression of patient autonomy, but in quite another it could derogate important aspects of physicians' fiduciary obligations for the overall well-being of their patients.

This Article takes the position that the most sensible compromise is to encourage doctors to help patients become more knowledgeable and savvy users of the complex scientific information they cannot in any event be prevented from seeing. This entails an obligation for doctors to be computerized information-literate themselves, a state which is far from uniform among physicians today.<sup>32</sup> One might also postulate that such an obligation could be satisfied sensibly and effectively, at least in part, at an institutional level by managed care plans or hospitals. Or might institutions taking on this responsibility generate an unacceptable stress on the increasingly-beleaguered physician-patient relationship?

## I. THE ROLE OF INFORMATION IN HEALTH CARE

In the U.S.'s market-based health care delivery system, good information is the *sine qua non* for the informed purchasing decisions that theoretically drive competition and create its efficiencies.<sup>33</sup> Without reliable information about the nature of disease and the therapy recommended to combat it, patients (the ultimate "purchasers" of medical services, even when that purchase is subsidized by employer-provided or government-purchased insurance<sup>34</sup> and constrained by managed care<sup>35</sup>) can do little more than blindly acquiesce in the preferences of others. Those preferences may be medical, economic, political, some

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32. See generally *GUIDELINES FOR CLINICAL PRACTICE* (Marilyn J. Field & Kathleen Lohr eds., 1992).

33. See Peter D. Fox, *Applying Managed Care Techniques in Traditional Medicare*, 16 *HEALTH AFF.* 44, 47-50 (1997) (discussing the uses of claims data in understanding and managing health care delivery systems).

34. Approximately 84% of the U.S. population is covered by some form of health insurance, either privately funded (primarily through employment), or publicly subsidized (primarily through the Medicare and Medicaid programs), outlined in *Statistical Abstract of the United States* 1997, at 120, table 171.

35. Managed care refers to a variety of methods for financing and organizing the delivery of comprehensive health care, primarily in order to control costs. See Dean M. Hashimoto, *The Future Role of Managed Care and Capitation in Worker's Compensation*, 22 *AM. J.L. & MED.* 233 (1996). More than 80% of all privately insured Americans rely on some form of managed care for their medical needs. Approximately 30% of Medicaid recipients and 14 percent of Medicare beneficiaries also depend on managed care organizations. See *AHCPR and AAHP Foundation to Examine Quality of Managed Care for Chronic Disease*, *HEALTH CARE STRATEGIC MGMT.*, Nov. 1, 1997, at 5.

combination of the three, or something else altogether. Patients may opt to defer to their doctors' medical judgment about proposed therapy rather than to exercise their own, but the law supports the position that their decisions *not* to decide are nonetheless entitled to be fully-informed ones.<sup>36</sup> The question of whether the patient (or someone else) can (or should) afford to exercise unfettered choice about medical treatment is quite another issue, and this Article side-steps that thorny quagmire.

The quality of health care information is notoriously variable, on the internet and elsewhere.<sup>37</sup> Moreover, few universally-observed standards for data collection and analysis exist, making comparative evaluation of research findings extraordinarily difficult.<sup>38</sup> "Like the fire hoses and hydrants at the turn of the century, health data today adhere to no single standard."<sup>39</sup> Recognizing this, Congress included in the Health Insurance Portability and Accountability Act (HIPAA)<sup>40</sup> an innovative section directing the Secretary of Health and Human Services to "encourag[e] . . . development of . . . standards and requirements for the electronic transmission of certain health information."<sup>41</sup> The Secretary was given until February 1998 to adopt standards governing health plans, health care providers and health care clearinghouses that transmit health care transactions electronically,<sup>42</sup> and health plans are required to comply with these standards within two to three years thereafter.<sup>43</sup> Moreover, any state laws which conflict with the federal legislation are explicitly pre-empted.<sup>44</sup> The Secretary has already

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36. See *Stover v. Association of Thoracic & Cardiovascular Surgeons*, 635 A.2d 1047, 1055-56 (Pa. Super. Ct. 1993) (Once a physician has satisfied the disclosure requirements of informed consent, the patient's decision *not* to decide is an exercise of choice.); William J. McNichols, *Informed Consent Liability in a "Material Information" Jurisdiction: What Does the Future Portend?*, 48 OKLA. L. REV. 711, 735 (1995) (informed consent implies informed refusal to decide); Bruce J. Winick, *Competency to Consent to Treatment: The Difference Between Assent and Objection*, 28 HOUS. L. REV. 15, 32 (1991) ("Many patients even waive disclosure by their physicians of the very information on which informed consent is based, accepting their physician's treatment recommendation without wishing to know the details."); *see also* *Palmer v. Biloxi Reg'l Med. Ctr.*, 564 So. 2d 1346, 1364 (Miss. 1990) (patient's waiver of the right to receive information is affirmative defense to recovery under informed consent doctrine).

37. Cf. Kristen B. Keltner, *Networked Health Information: Assuring Quality Control on the Internet*, 50 FED. COM. L.J. 416 (1998).

38. Rosanna M. Coffey et al., *The Case for National Health Data Standards*, 16 HEALTH AFF. 58 (1997).

39. *Id.* at 59.

40. Pub. L. 104-191, 110 Stat. 1988 (1996) (codified in scattered sections of 29 U.S.C., 42 U.S.C., and 18 U.S.C.).

41. Title II, Subtitle F of the HIPAA.

42. *Id.* § 1172[a].

43. *Id.* § 1175[b][1].

44. *Id.* § 1178. Many states have been actively developing health information systems, with limited success. *See generally* D. N. Mendelson & E. M. Salinsky, *Health Information Systems and the Role of State Government*, 16 HEALTH AFF. 106, May/June 1997.

made certain recommendations to Congress regarding the standards, not without stirring up controversy,<sup>45</sup> and a notice of proposed rulemaking about the final format should be forthcoming shortly in the Federal Register.

These standards are officially designated to promote "administrative simplification,"<sup>46</sup> primarily for federal reimbursement purposes, but they also facilitate a broad range of other health policy objectives enjoying bipartisan industry and public support. For example, consistent and compatible data can be used to evaluate and improve the clinical performance (including comparatively) of providers, and to advance the overall quality of clinical care within health systems. The National Committee on Quality Assurance (NCQA), which accredits managed care plans for health insurance purchasers and others,<sup>47</sup> has developed The Health Plan Employer Data and Information Set (HEDIS) as a measuring rod for plan performance, but HEDIS has only exposed the tip of the iceberg in evaluating MCO clinical effectiveness.<sup>48</sup> Moreover, MCO collection and submission of HEDIS data is voluntary, and not all plans choose to seek NCQA accreditation. Accreditation is becoming increasingly important for marketing purposes, however, and many large employers now refuse to contract with unaccredited plans.<sup>49</sup> In addition, the federal government now requires the MCOs with which it deals to supply HEDIS data for evaluation purposes.<sup>50</sup> Slowly, but surely, publicly accessible data collection relating to quality of care is improving and accumulating.

Uniform national standards obviously enhance the transparency of health care data, and facilitate analyses of clinical efficacy, cost-effectiveness, patient satisfaction and all manner of other health-related information, across a wide variety of data-collection systems, databases, and state and national boundaries. Uniform standards also have significant potential to improve public health, since they can help to identify public health hazards, demographic trends and health service deficiencies.<sup>51</sup> The public interest in facilitating these analyses seems compelling, since they have untapped potential to improve the quality and

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45. See Robert Pear, *Limited Access to Medical Records Is Urged*, N.Y. TIMES, Sept. 12, 1997, at A4.

46. Title II, Subtitle F of the HIPAA, § 262.

47. See generally John K. Iglehart, *The National Committee for Quality Assurance*, 335 NEW ENG. J. MED. 995 (1996).

48. HEDIS 3.0, the current version, now requires plans to collect relatively crude data on clinical efficacy. For a general discussion, see the HEDIS section of the NCQA website, located at <[www.ncqa.org](http://www.ncqa.org)>.

49. According to the Washington Business Group on Health, 60% of large employers (those with more than 1000 employees) consider NCQA accreditation status when deciding which plans to contract with. *Is Cost Everything? Getting Value for Your Health Care Dollar*, at 1 (1997) (monograph published by Washington Business Group & Watson Wyatt Worldwide).

50. See *Quality Assurance: NCQA Awarded \$2.37 Million Contract for Medicare HEDIS Collection*, BNA HEALTH CARE DAILY, July 31, 1997, at D7.

51. See Coffey et al., *supra* note 38.

availability of cost-effective patient care.<sup>52</sup> Community Health Information Networks (CHINS) have been grappling with the problems presented by attempts to analyze data from disparate sources for a number of years now, with varying degrees of success.<sup>53</sup>

Although serious and troubling privacy issues must be addressed to protect patient-identifiable information from improper disclosure,<sup>54</sup> many data analyses not focused on the care of specific patients can be conducted without any need for patient-identifiable information at all.<sup>55</sup> Moreover, the care of individual patients receiving health care in a number of settings, including in separate geographic areas, can be greatly enhanced by using appropriately-encrypted electronic medical records across compatible institutional databases.<sup>56</sup> Uniform health care data collection standards present undeniable privacy risks, but on balance the patient care and public policy justifications for implementing uniform electronic standards, contained by appropriate safeguards, outweigh the inevitable dangers.<sup>57</sup>

## II. BACKGROUND: PROBLEMS WITH HEALTH CARE INFORMATION

First, a caveat. Study upon study has demonstrated that the quality of health information varies.<sup>58</sup> But some data and information are very good, much of it is valuable although admittedly flawed, and even bad data sometimes can provide important clues for further investigation. Those who rail against reliance on data rather than on clinical judgment miss the point; both are complementary aspects of medical care, and neither should be relied on to the exclusion of the other.

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52. N.J. Hjelm & Franklin F.K. Tong, *Patients' Records on the Internet: A Boost for Evidence-Based Medicine*, 351 THE LANCET 1751 (1998).

53. Paul Starr, *Smart Policy, Stunted Technology: Developing Health Information Networks*, HEALTH AFF., May-June 1997.

54. Richard C. Turkington, *Medical Record Confidentiality Law, Scientific Research, and Data Collection in the Information Age*, 25 J.L., MED., & ETHICS 113 (1997). Consumer advocacy groups generally oppose the use of patient social security numbers as a health identifier, for obvious reasons. *See generally* NATIONAL RESEARCH COUNCIL, FOR THE RECORD: PROTECTING ELECTRONIC HEALTH INFORMATION (1997); Larry O. Gostin, *Health Information Privacy*, 80 CORNELL L. REV. 480 (1995). For a slightly dated survey overview of state legislation protecting medical privacy, see JONATHAN P. TOMES, *HEALTHCARE PRIVACY & CONFIDENTIALITY* (1994).

55. Cf. Latanya Sweeney, *Weaving Technology and Policy Together to Maintain Confidentiality*, 25 J.L., MED. & ETHICS 98 (1997).

56. *See generally* E. F. Meux, *Encrypting Personal Identifiers*, 29 HEALTH SERV. RESEARCH 247 (1994).

57. For a more recent survey of health information privacy legislation, see Lawrence O. Gostin, Zita Lazzarini et al., *The Public Health Information Infrastructure: A National Review of the Law on Health Information Privacy*, 275 JAMA 1921 (1996).

58. According to one scholar, “[Variation is] the most important characteristic of health care information.” S. JAMES KILPATRICK, *STATISTICAL PRINCIPLES IN HEALTH CARE INFORMATION* 2 (2nd ed. 1977).

For far too long, medicine's embarrassing secret was that precious little scientific basis could be found for much of accepted medical care. In 1913, George Bernard Shaw wrote in his introduction to *The Doctor's Dilemma*, "I presume nobody will question the existence of a widespread popular delusion that every doctor is a man of science . . . . As a matter of fact, the rank and file of doctors are no more scientific than their tailors; or, if you prefer to put it the reverse way, their tailors are no less scientific than they."<sup>59</sup> The state of scientific knowledge has improved remarkably since then, but it took the careful statistical findings of researchers like doctors John Wennberg and David Eddy two decades ago to convince the medical profession that it was no longer acceptable to conceal the level of scientific uncertainty underlying much of medical practice.<sup>60</sup>

The fluctuations Wennberg, Eddy and others observed among physicians' patterns of practice were, in Wennberg's words, "as strongly influenced by subjective factors related to the attitudes of individual physicians as by science."<sup>61</sup> According to Eddy, when he began his research he expected to find a logical, orderly basis for doctors' treatment decisions, but instead found them merely following rules of thumb collected from one another. These scholars' meticulous work broke the back of professional resistance to the evidence-based medicine concept, and was soon embraced by employers and the health insurers with whom they contracted to cover their employees' rapidly-escalating health care costs.<sup>62</sup> The government, which footed the bill for Medicare and Medicaid services, took notice as well, and began monitoring the quality of the health care services for which it was paying.<sup>63</sup> Word even reaches patients now. Some have slowly come to understand that with so much uncertainty and variability pervading much of medical practice, more shared decision-making about therapeutic choice might be desirable. Many patients assign their own values to imperfect information, and the level of medical uncertainty surrounding therapeutic alternatives can profoundly affect their treatment choices. In other words, uncertainty and variability can be material facts where informed patient consent is concerned.

Health care researchers often joke half-seriously that they must be careful what they measure, because the results have unsettling tendencies. Research findings tend to take on independent lives—and unpredictable ones at that,

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59. GEORGE BERNARD SHAW, *THE DOCTOR'S DILEMMA* at xxxi (1932).

60. For a description of the impact of Wennberg and Eddy's work (among that of others), see MICHAEL L. MILLENSON, *DEMANDING MEDICAL EXCELLENCE: DOCTORS AND ACCOUNTABILITY IN THE INFORMATION AGE* 43-51 (1977).

61. John E. Wennberg, *Dealing with Medical Practice Variations: A Proposal for Action*, 3 HEALTH AFF. 6 (1994).

62. See generally Thomas Bodenheimer & Kip Sullivan, *How Large Employers Are Shaping the Health Care Marketplace*, 338 NEW ENG. J. MED. 1003 (1998).

63. See generally Barbara Bigelow et al., *Corporate Political Strategy: Incorporating the Management of Public Policy Issues Into Hospital Strategy*, HEALTH CARE MGMT. REV., June 22, 1997, at 53 (citing Peer Review Organizations as an example of intense government regulation Medicare and Medicaid providers face).

particularly in the hands of the media. Health care data (defined for purposes of this article as the raw numbers generated by research) and information (conclusions drawn from the data) are critically important to informed health care decision-making, yet their reliability and significance can be widely misunderstood and subject to abuse. When data and information are good, they're very, very good. Patients, clinicians, payors and policy-makers make decisions more wisely when they understand what reliable data and information reveal about health care, its delivery and its efficacy. But when data and information are bad—or used badly—the fall-out on health care and its costs can be disastrous.

The United States has the best and most widely-available medical data resources in the world.<sup>64</sup> We have used computers extensively in the health sector for much longer than have other countries. Moreover, our traditional fee-for-service method of paying for health care has given us a much clearer—although far from complete—idea of the way providers treat individual patients than is currently possible to formulate for other countries. As managed care has expanded to cover more and more insured U.S. patients, managed care organizations, (MCOs) have continued to keep relatively close tabs on the clinical services for which they pay, even when they capitate providers.<sup>65</sup> As a consequence, we are constantly adding to an already rich and diverse—but far from definitive—data base about clinical diagnosis, inputs, outcomes, cost and patient satisfaction. This enterprise has been expedited by stunning advances in information technology and data collection techniques.<sup>66</sup> Partly as a result of this accumulated information about medical practice, the United States has been the most fertile environment in the world for empirical research involving health care. This has spawned an unmatched outpouring of professional health research literature, a significant amount of it now easily accessible on the internet.<sup>67</sup> Problems abound, however, when attempting to use this wealth of data wisely.

Empirical research can only tell us so much about health care. U.S. and British medical researchers, for example, usually put more stock in the value of inductive reasoning from empirical clinical data,<sup>68</sup> particularly the randomized

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64. *See generally* HIGHWAY TO HEALTH: TRANSFORMING U.S. HEALTH CARE IN THE INFORMATION AGE, COUNCIL ON COMPETITIVENESS (1996).

65. Many MCOs require their participating physicians to “dummy bill” for all patient services even when they are paid according to a capitated rate in order to evaluate the efficacy of care. Personal conversation with Dr. Joseph Gerstein, Medical Director of Tufts Affiliated Health Plan of MA, June 5, 1995. Notes on file with the author.

66. *See generally* HIGHWAY TO HEALTH: TRANSFORMING U.S. HEALTH CARE IN THE INFORMATION AGE, COUNCIL ON COMPETITIVENESS (1996); DAVID NASH, HEALTH ACCOUNTABILITY AND QUALITY IN HEALTH CARE: THE NEW RESPONSIBILITY (1995); KAREN A. DUNCAN, HEALTH INFORMATION AND HEALTH REFORM: UNDERSTANDING THE NEED FOR A NATIONAL HEALTH INFORMATION SYSTEM (1994).

67. See, for example, the National Center for Health Statistics website, located at <<http://www.cdc.gov/nchswww/nchshome.htm>>.

68. LYNN PAYER, MEDICINE AND CULTURE 28, 109-10 (1988).

clinical trial,<sup>69</sup> than do their more deductive French counterparts, so that great care must be exercised when comparing research findings across national borders.<sup>70</sup> But inductive reasoning is vulnerable to its own brands of distortion. To begin with, data collection itself can be flawed for any number of reasons, ranging from defective study design, to atypical study population choices, to poor data collection techniques. Moreover, these distortions can be accidental or deliberate and some pass completely unrecognized by researcher and data user alike.<sup>71</sup> Once data are analyzed and transformed to the information level, the opportunities for bias, misinterpretation and manipulation increase geometrically.

Marcia Angell, Executive Editor of the *New England Journal of Medicine*, provides a compelling account in *Science on Trial: The Clash of Medical Evidence and the Law in the Breast Implant Case*<sup>72</sup> of what she describes as an unfortunate chain of events set off by inaccurate interpretation of the Food and Drug Administration's decision to ban silicone breast implants. The FDA decision was based on a *lack* of reliable information about breast implant safety,<sup>73</sup> but that important point got submerged in the publicity attending announcement of the ban. The FDA's essentially cautious shift in regulatory position spawned a rash of product liability lawsuits, many of which wound up being decided or settled *before* any reliable scientific evidence about breast implant safety had been gathered.<sup>74</sup> Ultimately, the data and information generated by breast implant clinical studies turned out to be equivocal at best on the safety issue.<sup>75</sup> In Dr. Angell's opinion, the breast-implant controversy

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69. See David P. Bryer et al., *Design Considerations for AIDS Trials*, 323 NEW ENG. J. MED. 1343, 1345 (1990) ("[T]he double-blind, placebo-controlled, randomized clinical trial is usually regarded as the gold standard for evaluating treatments"); Jay Katz, *Human Experimentation and Human Rights*, 38 ST. LOUIS U. L.J. 7, 54 n.30 (1993); PAYER, *supra* note 68, at 27. But see Richard M. Royall, *Ethics and Statistics in Randomized Clinical Trials*, 6 STAT. SCI. 51, 55, 60 (1991) (arguing that importance of RCTs is exaggerated; that they are desired but not demanded by the medical community). Institutional Review Board (IRB) requirements can make RCTs difficult to conduct. See Richard S. Saver, *Critical Care Research and Informed Consent*, 75 N.C. L. REV. 205, 215-16 (1996). See generally 45 C.F.R. §§ 46.101-.124 (1998) (Dept. of Health and Human Services' IRB regulations). Current informed consent theory also complicates the use of RCTs. See Samuel Hellman & Deborah S. Hellman, *Of Mice But Not Men: Problems of the Randomized Clinical Trial*, 32 NEW ENG. J. MED. 1585-89 (1991) (discussing ethical problems with informed consent in RCTs).

70. Americans and Britons often suspect that more deductive scientific researchers have a tendency to observe what they are already looking for.

71. See generally Symposium, *Law, Ethics and Socially Responsible Research: Solutions for the 21st Century*, 24 AM. J.L. & MED. (1998) (forthcoming).

72. MARCIA ANGELL, *SCIENCE ON TRIAL: THE CLASH OF MEDICAL EVIDENCE AND THE LAW IN THE BREAST IMPLANT CASE* (1st ed. 1996).

73. Final rule requiring filing of pre-market approval application for implanting silicone gel-filled breast prosthesis, 56 FR 14620, available at 1991 WL 282885 (effective April 10, 1991).

74. ANGELL, *supra* note 72, at 10, 23.

75. *Id.* at 27.

illustrates the distortions which can ultimately result from lack, and then misunderstanding—or misuse—of scientific data and information.<sup>76</sup> The lesson is obvious: a little knowledge can be a dangerous thing.

The fruits of empirical research have often fit less than comfortably with the law—particularly in the courtroom—in part because empirical inquiry is usually motivated by very different premises from those activating legal scrutiny. In the idealized scientific scenario empirical inquiry constitutes a search for relative truth about the way the world functions. But good researchers always consider a scientific truth open to further refinement—indeed to outright refutation in the light of better evidence.<sup>77</sup>

Ideally, legal inquiry constitutes a search for truth as well, but the law usually seeks to settle facts and their meaning in order to terminate controversy, rather than to keep inquiry open and flexible. Scientific studies, on the other hand, are designed to achieve ends that do not necessarily mesh well with the law's customary goal of resolving factual dispute. Clinical studies all too often raise further questions upon which reasonable minds can differ, whereas the law usually seeks to put an end to controversies by labeling the meaning of contested facts with some degree of finality. Small wonder that scientific experts often balk at the way trial attorneys' questions are phrased when they seek to establish—or refute—legal causality on a scientific issue. When causality becomes relevant in the managed care context similar problems surface. The voluminous litigation over insurers' refusal to pay for experimental procedures is but one highly-visible example of that phenomenon<sup>78</sup> Another involves insurers' refusal to cover "unnecessary" care.<sup>79</sup> Both of these situations raise troublesome questions about the level of scientific uncertainty inevitably associated with medical diagnosis and treatment. But are not patients entitled to know that these uncertainties may affect the care they receive?

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76. The bendectin products liability litigation raised somewhat similar data and information issues related to causation. Joseph Saunders, *From Science to Evidence: The Testimony on Causation in the Bendectin Cases*, 46 STAN. L. REV. 1 (1993).

77. Hence the old saw, "a scientific fact is accepted as true only for so long as not proven to be otherwise." Margaret G. Farrell, *Coping with Scientific Evidence: The Use of Special Masters*, 43 EMORY L.J. 937, 942 (1994).

78. See, e.g., *Fox v. Health Net*, No. 219692 (Cal. Sup. Ct., Dec. 23, 1993), available in 3 HEALTH LAW RPTR. (BNA) 18 (1994) (Extremely high jury verdict for insurers' refusal to pay for autologous bone marrow transplantation for patient suffering from breast cancer.). See also Mark Hall et al., *Judicial Protection of Managed Care Consumers: An Empirical Study of Insurance Coverage Disputes*, 26 SETON HALL L. REV. 1055 (1996); Note, *Reimbursing New Technologies: Why Are the Courts Judging Experimental Medicine?*, 44 STAN. L. REV. 1095 (1992).

79. Mark Hall & Gerrard Anderson, *Health Insurers' Assessment of Medical Necessity*, 140 U. PA. L. REV. 1637 (1992).

### III. DATA-BASED INFORMATION AND EXPANDING INFORMED CONSENT DOCTRINE

#### A. *Physicians, Information and Informed Consent*

1. *Information About Therapy.*—The theoretical basis for a physician's negligent failure to secure an informed patient consent to therapy has come a very long way from the original battery rationale for requiring patient consent to medical touching. Informed consent doctrine now encompasses some distinctly different autonomy issues under the negligence rubric, including several non-medical ones.<sup>80</sup> The well-known California Supreme Court opinion in *Truman v. Thomas*, for example, established a physician's responsibility for securing a patient's informed *refusal* of recommended medical procedures.<sup>81</sup> The battery concept is literally irrelevant to the legal analysis in that opinion.

*Moore v. Regents of the University of California*,<sup>82</sup> also from the California Supreme Court, established that a patient has an informed consent cause of action for his doctors' failure to inform him of their personal conflicts of interest—in this case research and economic interests—that could affect their medical judgment. Although one could construct an attenuated battery interest in *Moore*, the battery concept is at best tangential to the analytical focus on the physicians' fiduciary responsibilities toward their patient. Several recent cases involving data-based statistical information have pushed informed consent theory even further into previously-unexplored legal territory.

In *Arato v. Avedon*,<sup>83</sup> for example, the California Supreme Court confronted the issue of whether physicians have a duty to disclose statistical life expectancy when discussing a patient's illness.<sup>84</sup> In the case in question the plaintiffs' decedent was suffering from pancreatic cancer, which has a very high statistical mortality rate.<sup>85</sup> The treating physicians never informed Mr. Arato of that fact, notwithstanding that he had checked the box on a medical questionnaire indicating that he wished to be told the truth about his condition rather than to have his doctors "bear the burden" for him.<sup>86</sup> Although the treatment team did inform him that most people suffering from pancreatic cancer die of the disease, the plaintiffs alleged that had Mr. Arato been told of his statistical life

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80. *Pratt v. Davis*, 118 Ill. App. 161 (1905) (This case, in which the defendant had intentionally performed a hysterectomy on the plaintiff while telling her that he was only going to repair cervical and rectal tears, was actually framed as one of trespass.); *see also supra* note 9 and accompanying text.

81. 611 P.2d 902 (1980) (patient who died of cervical cancer allegedly declined to have physician-recommended pap smear for financial reasons).

82. 793 P.2d 479 (Cal. 1990).

83. 858 P.2d 598 (Cal. 1993).

84. *See* Denise A. Dickerson, Note, *A Doctor's Duty to Disclose Life Expectancy Information to Terminally Ill Patients*, 43 CLEV. ST. L. REV. 319 (1995).

85. Only 5% to 10% of those afflicted with pancreatic cancer live for as long as five years after diagnosis. *See id.* at 602.

86. *Id.* at 601.

expectancy he would have arranged his estate planning and business affairs to provide better financial security for his family.

The defendant physicians justified their silence on the ground that, among other reasons, Mr. Arato and his wife had never explicitly asked for life expectancy information in the course of "more than 70 visits over a period of a year" Moreover, the doctors all "testified that statistical life expectancy data had little predictive value when applied to a particular patient with individualized symptoms, medical history, character traits and other variables."<sup>87</sup> Taken together, these two justifications reveal an interesting story about the medical profession's attitude toward informed consent.

Although the Aratos apparently had never specifically asked for mortality data, the defendant doctors explicitly sought to shift the burden of acquiring statistical life expectancy information to the patient, notwithstanding a clear and unambiguous expression of the patient's interest in being "told the truth"—which they themselves had solicited. Why did the treatment team solicit information from the patient about disclosure preferences if the doctors did not intend to act upon it? Or did the physicians regard statistical life expectancy information an unimportant factor for those facing terminal illness to consider? One doubts whether the treatment team would have considered such information immaterial had they themselves been in the patient's situation. Surely in California, with its patient-centered standard of disclosure requiring a doctor to inform patients about *all* information reasonable patients would consider material to informed decisions about medical treatment,<sup>88</sup> one might reasonably conclude that statistical life expectancy information met the materiality criterion.

The *Arato* Court of Appeal ruled that this was so as a matter of law, and overruled a jury verdict to the contrary.<sup>89</sup> The California Supreme Court reversed the Court of Appeal, however, and held that although the materiality of life expectancy information was indeed an appropriate issue, it was a matter of fact for the jury rather than one for courts to decide.<sup>90</sup> The point important for purposes of this article remained; patients may well consider statistical life expectancy information related to their medical conditions highly relevant for a wide range of reasons, not all of them strictly related to clinical treatment and response. The California decisions have explicitly established that broader patient values beyond medical care alone are implicated in a physician's duty to disclose information to patients.

With regard to the defendant doctors' assertion in *Arato* that statistical life expectancy can mean little to the individual patient, such a position begs the ultimate question. Would a reasonable patient consider the statistical *range* of life expectancies for his condition material, knowing there to be no way of accurately predicting where he himself might ultimately fit on that spectrum? One could well posit that the more dramatic the impact of a shortened life span,

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87. *Id.*

88. *Cobbs v. Grant*, 502 P.2d 1 (Cal. 1972).

89. 11 Cal. Rptr. 2d 169 (1992).

90. *Arato*, 858 P.2d at 605.

the greater the duty to disclose the range of expected mortality outcomes to patients, regardless of an inability to pinpoint the particular patient's precise odds. That range can indeed constitute critically important information to a patient considering alternatives, affecting such issues beyond mere survival as the quality of remaining life and how to use it, business and social obligations, and the emotional stress of the patient's illness on loved ones.

Another notable opinion involving the disclosure of medical statistics, *Johnson v. Kokemoor*,<sup>91</sup> was handed down in 1996 by the Wisconsin Supreme Court. The plaintiff in *Kokemoor* had an enlarging aneurism at the back of her brain, and was operated on in a community hospital by a surgeon inexperienced in doing such complicated and risk-laden procedures. In fact, the surgeon had never before attempted to repair this particularly complex form of lesion. Although the aneurism was successfully clipped, plaintiff became an incomplete quadriplegic in the operation's aftermath. Among other deficits, she was rendered unable to walk or to control bowel and bladder functions.

The plaintiff contended that defendant surgeon's failure to disclose his own inexperience in performing the procedure, and to disclose comparative morbidity and mortality rates (which he admitted knowing) for more accomplished surgeons and facilities, stated a cause of action for failure to obtain an informed consent prior to performing what was conceded to be an elective operation. Moreover, the plaintiff contended that the defendant was negligent in failing to refer her to the Mayo Clinic, a sophisticated tertiary care center just ninety miles away. Many had far greater familiarity with her complicated and relatively rare anomaly, and had as good a track record in repairing them as existed anywhere.

The Wisconsin Supreme Court held that the plaintiff was entitled to introduce evidence on all three of those issues, in essence accepting the argument that comparative statistical evidence—despite its imprecision—can indeed be material to an informed decision about whether, where, and with whom to undergo therapy. Just because specific risk cannot be pinpointed does not mean that the range of probabilities is not material information to a patient's decision to undergo therapy, particularly when risky elective surgery is involved. Moreover, given the disparity of statistical risk between the defendant's performing the procedure in a community hospital and having it performed at the nearby Mayo Clinic with its extensive microsurgical facilities, neurological intensive care unit, and more experienced surgeons, "[a] close link exists between such data and the propriety of referring the patient elsewhere."<sup>92</sup>

Information about the existence of a (relatively) safer surgical environment can be just as material to a patient as is information about a different and safer procedure altogether. Both constitute alternatives which may be material to a patient's decision; the first concerns venue while the second focuses on the therapy itself. "When the duty to share comparative risk data is material to a patient's exercise of informed consent, an ensuing referral elsewhere will often

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91. 545 N.W.2d 495 (Wis. 1996).

92. *Id.* at 510.

represent no more than a modest and logical next step.”<sup>93</sup>

Prior informed consent cases had not generally imposed a duty on surgeons to give percentage risks for surgical procedures,<sup>94</sup> and *Kokemoor* was careful to limit its holding that the trial court did not err in admitting plaintiff’s statistical evidence of relative risk to the facts of the case.<sup>95</sup> A subsequent case, citing *Kokemoor*, has held further that a plaintiff is not *required* to submit statistical evidence of probability in an informed consent claim in order to prevail.<sup>96</sup> Since the quality of statistical risk information is improving dramatically, along with the reliability and accessibility of other health-related data, courts will inevitably be paying greater attention to their materiality to an informed consent as time goes on.<sup>97</sup> At least one decision, rendered twenty years ago, held that when a consent claim involving an unfortunate medical outcome is framed in battery terms, statistical probabilities of adverse outcomes not only regarding the procedure itself, but the defendant doctor as well, constitute relevant information.<sup>98</sup>

2. *Information About Physicians.*—How much do patients really know about those doctors whose clinical judgment they may choose to trust? In the growing—but still small—number of jurisdictions where physician profiles have become available on-line,<sup>99</sup> patients can actually learn a fair amount very easily. In Massachusetts, for example, these profiles contain “positive” information about the basic building blocks of state-licensed physician competence, such as doctors’ training, research, institutional affiliations and the health insurance plans for which they provide services. The profiles also contain “negative” information pertaining to the very small minority of doctors for whom insurers have paid out money on malpractice claims, or who have incurred institutional or licensing board disciplinary sanctions, or criminal convictions, within the preceding ten years.<sup>100</sup>

From May of 1997 when these daily-updated physician profiles first went on-line through September of that same year, the Massachusetts Board of

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93. *Id.*

94. *Kennedy v. St. Charles Gen. Hosp. Auxiliary*, 630 So. 2d 888, 892 (La. Ct. App. 1993).

95. *Kokemoor*, 545 N.W.2d at 508.

96. *Frost v. Brenner*, 693 A.2d 149, 155 (N.J. Super. Ct. App. Div. 1997).

97. Cf. Mark R. Chassin et al., *Benefits and Hazards of Reporting Medical Outcomes Publicly*, 334 NEW ENG. J. MED. 394 (1996) (patients apparently do not switch providers as a result of comparative performance data about physicians).

98. *Hales v. Pittman*, 576 P.2d 493 (Ariz. 1978).

99. Massachusetts and Florida currently have legislation requiring profiles of all licensed physicians to be available on the Web. See, e.g., Mass. Physician Profiling Act, MASS. GEN. LAWS ANN. ch. 112, § 2 (West 1996). Similar legislation has been introduced in California, Connecticut, Illinois, Maine, Maryland, Rhode Island, Texas and Vermont. The medical licensing boards of Arizona, California, Iowa, Massachusetts, North Carolina and Texas all now profile physicians holding licenses at <www.docboard.org> as well.

100. Frances H. Miller, *Illuminating Patient Choice: Releasing Physician-Specific Data to the Public*, 8 LOY. CONSUMER L. REP. 125 (1995-1996).

Registration in Medicine website had 1.6 million "hits" from internet users seeking information on Massachusetts-licensed doctors.<sup>101</sup> Health care consumers thus immediately demonstrated that the time and resources the state devoted to constructing the database and making the information electronically available were well-spent from a public-access point of view.<sup>102</sup> The website currently records an average of 700 hits per day.<sup>103</sup> Physician "report cards," such as those compiled by the state of New York on cardiothoracic surgeons,<sup>104</sup> in Pennsylvania,<sup>105</sup> and elsewhere, offer much more substantive and detailed statistical information about physician performance.<sup>106</sup> Moreover, various private initiatives such as purchaser coalitions, hospital associations and the Federal Employees Benefits Program now compile and release provider profiling and benchmarking information to the public, often making it available via the internet.<sup>107</sup>

### *B. Institutions, Information and Informed Consent*

Many hospitals—and some MCOs—have seized the marketing opportunity the internet's information explosion offers for forging better relationships with

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101. Statistics furnished by Massachusetts Board of Registration in Medicine. Copy on file with the author.

102. Jeffrey P. Donohue, *Developing Issues Under the Massachusetts "Physician Profile" Act*, 23 AM. J.L. & MED. 115 (1997).

103. The American Medical Association has also recently announced a program for accrediting doctors who meet specified quality standards. However, the accreditation system will be entirely voluntary, and doctors will have to pay a fee to be evaluated by the AMA. Moreover, patients will have access to very little specific data about their physicians, and the program's clinical performance and patient care and satisfaction standards for evaluation have yet to be formulated, let alone implemented. Although managed care plans will have full access to the AMA data, since fewer than 40% of the nation's doctors belong to the professional organization, its seal of approval will be far short of comprehensive unless large numbers of non-AMA members opt to be evaluated. In short, this program is not expected to yield much of significance with which patients can evaluate physicians. *AMA to Give Doctors Seal of Approval*, BOSTON GLOBE, Nov. 19, 1997, at A11.

104. See, e.g., Edward Hannan et al., *Improving the Outcomes of Coronary Artery Bypass Surgery in New York State*, 271 JAMA 761 (1994).

105. James G. Jollis & Patrick S. Romano, *Pennsylvania's "Focus on Heart Attack"—Grading the Scorecard*, 338 NEW ENG. J. MED. 983 (1998) (concluding "Pennsylvania's pioneering report on mortality from heart attacks has numerous strengths."). *Id.* at 986.

106. See Hannan et al., *supra* note 104, at 761 (After N.Y. state began disseminating hospital and physician-specific data for coronary artery bypass surgery in 1989, providers altered their practice, resulting in a 41% decline in risk-adjusted mortality by 1992.); E. L. Hannan et al., *Using Medicare Claims Data to Assess Provider Quality for CABG Surgery: Does it Work Well Enough?*, HEALTH SERVICES RESEARCH, Feb. 1997, at 659.

107. Troyen Brennan & Donald Berwick, *The Role of Regulation in Quality Improvement* (1998) (unpublished manuscript).

patients and subscribers. They equip "patient resource centers" physically situated in their facilities with medical information of all sorts in printed form, plus banks of computers and dedicated medical librarians to help patients wend their way through the thickets of on-line and other medical information sources.<sup>108</sup>

These institutions realize that the better patients understand their illnesses, the more likely they are to comply with treatment regimes, and the less likely they are to be unhappy with the institution when therapy is unsuccessful or when known side effects occur.<sup>109</sup> They also understand that providing patients access to information resources constitutes good public relations for the institution, regardless of whether individual patients actually make use of them.<sup>110</sup>

Does this mean that hospitals are moving into an active intermediary role between patients and physicians with regard to informed consent? The older cases imposed no duty on a hospital to insure that patient consent to therapy carried out within the institution was informed<sup>111</sup> considering such intervention detrimental to the fragile and highly-personal physician-patient relationship.

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108. For example, Beth Israel-Deaconess Learning Center in Boston, located in a major teaching hospital for Harvard Medical School, educates patients and their families to take a more active role in their own health care. The center has three computers, a printer and a photocopier all dedicated to patient use. It also has 250 videos, more than 1,000 books, audiotapes, and multiple health care-related databases, plus a full-time librarian who is also a nurse to help with patient use and answer questions. The librarian reports that 25 to 30 persons use the facility on an average day, and that the typical users are women in the 30- to 50-year-old age range, because "they are the primary health care decision makers in families." She also reports that the center appears to be well-accepted by the medical staff, who have been educated about its existence and refer most of their clients, and that she has received only two complaints in the two years of its existence. One was from a doctor annoyed by a patient "taking up too much of his time with questions from material relating to her disease obtained from the learning center." Interview by C. Kyle with Anne Fladger, MLS, Program Coordinator/Librarian, Beth Israel-Deaconess Learning Center (Jan. 9, 1998). Notes on file with the author.

109. Bill Siwicki, *Software, Internet Create New Avenues for Patient Education*, HEALTH DATA MGMT., Jan. 19, 1997, at 175, available in 1997 WL 8747778 (discussing growth and value in patient education systems).

110. Fred D. Cavinder, *Volumes to Aid All Who Are Ailing: St. Francis South Campus Has Library with Videos and Resources for the Public's Perusal*, INDIANAPOLIS STAR, Apr. 30, 1997, at S03, available in 1997 WL 2879881. The Beth Israel Hospital implemented the country's first Hospital Patient's Bill of Rights in the 1970s, and enjoys a reputation as the most patient-friendly major teaching hospital in the Boston area.

111. See, e.g., *Fiorentino v. Wenger*, 227 N.E.2d 296 (N.Y. 1967) (no obligation for a private hospital to ensure that patient has given informed consent to a radical, unique and dangerous operation performed within the institution by privately retained surgeon; "the hospital . . . should not share in the responsibility to advise patients of the novelty and risks attendant on the procedure"); *Cox v. Haworth*, 283 S.E.2d 392 (N.C. Ct. App. 1981) (holding hospital was under no duty to inform patient of nature of procedure to be performed when patient under the care of a privately retained physician).

Moreover, hospital intervention was considered undesirable from a public policy perspective, since it would be likely to chill clinical innovation.<sup>112</sup> Most of the newer cases have followed the same rationale.<sup>113</sup>

As direct hospital liability for the quality of patient care within institutions became more and more widely accepted,<sup>114</sup> however, basic principles of institutional responsibility have in a small number of cases come to encompass a duty to ensure that patients give their informed consent to procedures performed therein.<sup>115</sup> Certainly when today's patients are encouraged by hospitals—if not required—to sign consent forms upon admission or before undergoing outpatient procedures,<sup>116</sup> a persuasive argument can be mounted that the institution undertakes some duty directly to patients regarding informed consent, and should therefore be held responsible for making sure that it is carried out properly.<sup>117</sup>

The federal government has also been prodding hospitals to assume more direct responsibility concerning patient consent to medical treatment, although in limited ways. At least since 1975 when the then-Department of Health Education and Welfare first published its "Policy for the Protection of Human Research Subjects,"<sup>118</sup> hospitals and other health care institutions have been

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112. *Id.*

113. See, e.g., *Petriello v. Kalman*, 576 A.2d 474 (Conn. 1990); *Howell v. Spokane & Inland Empire Blood Bank*, 785 P.2d 815 (Wash. 1990).

114. The landmark case of *Darling v. Charleston Community Memorial Hospital*, 211 N.E.2d 253 (Ill. 1965) (hospital failed to exercise adequate supervision over quality of care provided by orthopedic surgeon with staff privileges), first articulated the principle of direct hospital liability to patients for care that fails to meet the community standard of care among hospitals. Cf. Dale H. Cowan & Eva Bertsch, *Innovative Therapy: The Responsibility of Hospitals*, 5 J. LEGAL MED. 219 (1984).

115. See, e.g., *Urban v. Spohn Hosp.*, 869 S.W.2d 450 (Tex. App. 1993) (hospital nurse failed to communicate patient's wish not to have surgical procedure to surgeon); *Keel v. St. Elizabeth's Med. Ctr.*, 842 S.W.2d 860 (Ky. 1992) (hospital had duty to obtain patient's informed consent prior to CT scan performed by hospital, but ordered by physician); *Doctors Mem'l Hosp. v. Evans*, 543 So. 2d 809 (Fla. Dist. Ct. App. 1989) (hospital could be liable for it's radiologist-agent's failure to secure informed patient consent to test); *Magana v. Elie*, 439 N.E.2d 1319 (Ill. App. Ct. 1982) (hospital must exercise reasonable care, which could include duty to ensure that hospital patient's informed consent has been obtained by health care provider prior to procedure). See also *Murrey v. United States*, 73 F.3d 1448 (7th Cir. 1996) (hospital's alleged failure to obtain patient's informed consent prior to prostatectomy surgery could constitute an administrative claim under the FTCA).

116. See Catherine Jones, *Autonomy & Informed Consent in Medical Decisionmaking: Toward a New Self-Fulfilling Prophecy*, 47 WASH. & LEE L. REV. 379, 429 n.73 (1990).

117. Cf. *Lincoln v. Gupta*, 370 N.W. 2d 312 (Mich. Ct. App. 1985) (hospital supplied consent form, but it was signed by defendant physician; it was the physician's, not the hospital's, duty to ensure that the patient's informed consent was obtained).

118. On the U.S. history of human experimentation, see DAVID ROTHMAN, *STRANGERS AT THE BEDSIDE* (1991).

required to assume a more activist role with regard to federally-funded research on human subjects.<sup>119</sup> The Institutional Review Boards (IRBs) set up to comply with those federal requirements must not only "review research proposals in order to determine whether the investigator has complied with informed consent requirements," but ensure that the researchers adequately protect human subjects.<sup>120</sup>

Most health care institutions channel all but their low-level research proposals through their federally-mandated IRBs, on the theory that all patients deserve the same level of protection when it comes to experimental studies, regardless of the funding source.<sup>121</sup> Nonetheless, clinical innovations not involving the experimental use of drugs or devices still remain in a basically unregulated limbo.<sup>122</sup> Courts have remained reluctant to impose malpractice liability for clinical innovation *per se*,<sup>123</sup> particularly when the patient has specifically consented to serving as an experimental subject.<sup>124</sup>

The Patient Self-Determination Act, enacted as part of OBRA 1990, requires hospitals to undertake a limited informed consent role with respect to *all* of their patients.<sup>125</sup> The requirement stops far short of requiring a hospital to secure patients' informed consent to treatment within the institution, but it does compel hospitals to provide all patients with written information setting forth their rights under state law to make their own medical decisions. Hospitals also must provide patients information about their written policies for implementing those rights.<sup>126</sup> Although the legislative history reveals that the Act was intended primarily to acquaint patients with their right to *refuse* medical treatment<sup>127</sup>

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119. For the current HHS regulations governing informed consent, see 45 C.F.R. §§ 46.116, 46.117 (1997).

120. 45 C.F.R. §§ 46.109, 46.116 (1997); *see also* Karen H. Rothenberg, *Gender Matters: Implications for Clinical Research and Women's Health Care*, 32 Hous. L. Rev. 1201, 1218 n.113 (1996) (citing Joan Porter, *The Federal Policy for the Protection of Human Subjects*, 13 IRB: A REVIEW OF HUMAN SUBJECTS RES. 8 (1991)).

121. FDA regulations, however, apply the same principles to both privately and publicly funded research on new drugs and devices. 21 C.F.R. § 301.50.20 (1996).

122. *See generally* Dale H. Cowan & Eva Bertsch, *Innovative Therapy: The Responsibility of Hospitals*, 5 J. LEGAL MED. 219 (1984).

123. *Brook v. St. John's Hickey Mem'l Hosp.*, 380 N.E.2d 72 (Ind. 1978) (physician not negligent for choosing unusual injection site on infant).

124. *Karp v. Cooley*, 493 F.2d 408 (5th Cir. 1974) (wrongful death action against surgeon implanting world's first mechanical heart). *See generally* *Health Law Symposium*, 38 ST. LOUIS U. L.J. 1 (1993) (on the legal regulation of medical research).

125. 42 U.S.C. § 1395cc (a)(1), (f)(1)(A) (1994).

126. Edward A. Larson & Thomas A. Eaton, *The Limits of Advanced Directives: A History and Assessment of the Patient Self-Determination Act*, 32 WAKE FOREST L. REV. 251 (1997).

127. *Living Wills: Hearings Before the Subcomm. On Medicare and Long-Term Care of the Sen. Comm. On Finance*, 101st Cong. (1990); *Fiscal Year 1991 Reconciliation Issues Relating to Durable Medical Equipment, Clinical Laboratory Services, and Other Issues Under the Medicare Program: Hearings Before the Subcomm. On Health of the House Comm. On Ways and Means*,

presumably if hospitals must have policies designed to inform patients of their rights, Congress considers hospitals to have something more than a purely passive role regarding patient consent. The more hospitals facilitate patient information-gathering by such means as patient resource centers,<sup>128</sup> the more they assume an activist role. COBRA's anti-dumping provisions also impose patient consent responsibilities on hospitals when emergency victims are to be transferred to other facilities.<sup>129</sup>

The trend of these developments is clearly toward accumulating evidence regarding the customary standard hospitals observe about securing informed patient consent. This same kind of accumulated evidence led the Illinois Supreme Court to conclude in the landmark case of *Darling v. Charleston Community Memorial Hospital*<sup>130</sup> that hospitals had undertaken a duty directly to patients for the quality of care delivered within their institutions. Several recent decisions have alluded to the fact that a hospital's responsibilities regarding informed consent are to be tested by *Darling*'s customary hospital practice standard. It may only be a matter of time, therefore, until the accumulation of legislative, accreditation, hospital by-law and other requirements motivate all hospitals to take on much the same direct responsibility to patients regarding informed consent as the *Darling* court found they had assumed concerning clinical practice more than thirty years ago. Although courts have generally resisted this idea thus far, at least one 1994 Georgia case has held a hospital responsible for violating its own internal procedures when a nurse failed to secure a properly-executed consent form for the patient record.<sup>131</sup> And in an even more recent opinion, an Illinois court held that at least when experimental procedures are involved, "a hospital . . . may be held liable for a patient's defective consent."<sup>132</sup>

Managed care organizations have generally kept a lower profile on informed consent issues than have hospitals, but the more tightly organized the MCO, the more likely it is to take an active role to ensure that patient consent has been obtained for certain therapeutic choices. For example, Kaiser Permanente of Southern California has implemented a practice guideline for contrast media used in radiographic studies which was forthrightly influenced by cost-containment considerations. Kaiser ascertained that by judiciously utilizing the contrast media on appropriate patients, patient safety could be adequately safeguarded.<sup>133</sup> The substantially lower-cost but slightly riskier ionic contrast medium is now used in Kaiser facilities *unless* the patient exhibits certain medical characteristics common to those susceptible to an allergic reaction or unless the patient objects. In those situations, the more expensive but less risky non-ionic medium is used.

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101st Cong. (1990).

128. *See supra* note 108.

129. 42 U.S.C.A. § 1395dd(c)(1)(A)(i) (1994).

130. 211 N.E.2d 253 (Ill. 1965).

131. *Butler v. South Fulton Med. Ctr.*, 452 S.E.2d 768, 772 (Ga. Ct. App. 1994).

132. *Kus v. Sherman Hosp.*, 644 N.E.2d 1214, 1220 (Ill. App. Ct. 1995).

133. *Ionic v. NonIonic Contrast Agents*, CLINICAL PRAC. GUIDELINES, Jan. 1997, at 265.

Kaiser employs a computer-based cascading consent form replete with statistical data to acquaint patients with the risks and benefits of these contrast media alternatives, specifically identifying the patient population vulnerable to reactions and placing the particular patient within or without the higher-risk category. Kaiser reportedly abides by patients' informed choices about whether the more expensive medium should be used, even when the screening criteria exclude those patients from the high-risk group.<sup>134</sup>

Apparently few patients not fitting the medical profile for receiving the more expensive non-ionic agent have objected to the lower-cost alternative over the six years since the guideline went into effect, and Kaiser reports saving at least \$12 million/per year on radiographic studies as a direct result of implementing the guideline.<sup>135</sup> When an MCO takes such a directly interactive role with patients on a consent issue, it should not be surprising if a court holds it responsible for carrying out its voluntarily assumed role non-negligently on a broader set of consent issues. An MCO which offers patients assistance in finding understanding and using statistical data about therapeutic alternatives will be in the best position to defend itself in litigation.

### CONCLUSION

Health care information technology changes not only what we can know, but the way we think. Medical data and information formerly considered beyond the ken, even if not always the reach, of laypeople is becoming increasingly understandable—and much more accessible—thanks to computers and the internet. As a result, computer-literate patients are rapidly becoming more sophisticated about what medical science and individual providers can and cannot offer them. They are also becoming increasingly sophisticated about what information they expect from their doctors before agreeing to undergo—or forego—therapy. As the information explosion facilitated by technology finds spillover expression in the printed word and on radio and television, it is starting to generate similar expectations from the diminishing number of patients still lacking computer skills or easy access to computers.

The effects of this phenomenon are beginning to find expression in the law of informed consent, if one reads the tea leaves closely. Cases like *Kokemoor* clearly show the influence of information technology. The statistical comparisons at the heart of the Wisconsin Supreme Court's discussion of informed consent would probably not have been generated without the aid of computers, and they certainly would not have been so generally accessible within the medical community. The court accepted with little question that comparative statistics may well be material facts for purposes of informed consent. Indeed, the opinion implied further that armed with negative relative data, a reasonable physician might have a duty to refer patients elsewhere for care. The point of the

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134. Personal conversation with Alan Bredt, M.D., Associate Medical Director for Clinical Services, Kaiser Permanente of Southern California, June 5, 1997. Notes on file with the author.

135. *Id.*

opinion, however, was that a jury could well conclude that a defendant doctor ought to make detailed and accurate statistical comparisons available to patients faced with difficult surgery.

In the earlier *Arato* opinion, the California Supreme Court grappled at length with the importance of (computer-generated) statistical life expectancy data to patients, again holding that the jury was entitled to consider whether the defendants' failure to furnish them to a patient constituted a failure to disclose material facts. Although the defendants sought to shift the burden of further inquiry regarding statistical life expectancy to the plaintiff, the decision focused squarely on the physicians' traditional duty to disclose rather than on fashioning any putative patient obligation to inquire. However, the more ordinary patients can be assumed to know about the existence of statistical data and information thanks to information technology and the media, the more likely they are to consider such information material to health care decision-making. Doctors should therefore expect to have more responsibility for ensuring that patients be given the opportunity to acquire that knowledge.

Most of tomorrow's patients will be more familiar with finding computer-generated health care information than are today's, although they may not always apply it accurately to their medical problems. Doctors who ignore their patients' increasingly sophisticated knowledge base will probably find themselves in a shrinking minority, more vulnerable to informed consent litigation based on a failure to discuss therapy at more advanced levels of materiality. Even in those jurisdictions with physician-centered rather than patient-oriented standards of disclosure, patients will be likely to possess or know how to secure far greater medical knowledge than has been customary in the past, and standards of disclosure will have to rise to accommodate that fact. A little knowledge can sometimes be a dangerous thing, but ignorance about the meaning of knowledge can be worse. Both doctors and patients will be best served by working in tandem to harness the profusion of medical information unleashed by modern technology, in the interest of patient autonomy. The law of informed consent will require no less.

## SYMPOSIUM

### INDIANA'S MEDICAL MALPRACTICE REFORM REVISITED: A LIMITED CONSTITUTIONAL CHALLENGE

ELEANOR D. KINNEY\*

In May 1998, the Indiana Supreme Court heard arguments in four cases challenging the constitutionality of the two-year occurrence-based statute of limitations<sup>1</sup> in Indiana's renowned Medical Malpractice Reform Act.<sup>2</sup> The Indiana Supreme Court has consolidated four cases raising this challenge.<sup>3</sup>

In the leading case, *Martin v. Richey*,<sup>4</sup> Judge Riley for the Indiana Court of Appeals ruled that the occurrence-based two-year statute of limitations violated the equal privileges and immunities clause of the Indiana Constitution<sup>5</sup> in that malpractice tort claimants are treated differently than other tort claimants and also malpractice tort claimants that fail to discover their injury within two years of its occurrence are treated differently than other malpractice claimants.<sup>6</sup> Following *Collins v. Day*,<sup>7</sup> the court ruled that, while the statutory distinction between malpractice claimants and other tort claimants was "reasonably related to the goal of maintaining sufficient medical treatment and controlling malpractice insurance costs,"<sup>8</sup> all malpractice claimants were not equally affected

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1. IND. CODE § 27-12-7-1 (1993).

2. *Id.* §§ 27-12-1-1 to -18-2.

3. *Martin v. Richey*, 674 N.E.2d 1015 (Ind. Ct. App. 1997); *Johnson v. Gupta*, 682 N.E.2d 827 (Ind. Ct. App. 1997); *Harris v. Raymond*, 680 N.E.2d 551 (Ind. Ct. App. 1997); *Jordan v. Read*, 677 N.E.2d 640 (Ind. Ct. App. 1997) (Unpublished Memorandum Decision).

4. 674 N.E.2d at 1015.

5. IND. CONST. art. I, § 23.

6. 674 N.E.2d at 1019-23.

7. 644 N.E.2d 72 (Ind. 1994). In this case, the supreme court abandoned the traditional Fourteenth Amendment scrutiny and gave independent significance to the Equal Protection Clause in Indiana's Constitution. The supreme court established two requirements for statutes granting unequal privileges or immunities to different classes of people. First, the disparate treatment accorded by the legislature must be reasonably related to the inherent characteristics which distinguish the unequally treated classes. Second, the preferential treatment must be uniformly applicable and equally available to all persons similarly situated. *Id.* at 80, quoted in *Martin*, 674 N.E.2d at 1022.

8. 674 N.E.2d at 1022.

by the classification and that the “statute as it stands completely forecloses the opportunity to be heard to potentially a very large percentage of those plaintiffs within the class.”<sup>9</sup> The court of appeals also ruled that the “open courts” clause of the Indiana Constitution<sup>10</sup> was also violated.<sup>11</sup> In so ruling, the court of appeals was guided by decisions of Texas courts construing a similar occurrence-based statute of limitations for malpractice claims<sup>12</sup> in light of a similar “open courts” clause in the Texas Constitution<sup>13</sup> as well as a thorough review of the constitutional debates over the “open courts” clause in Indiana’s 1851 Constitution.<sup>14</sup>

In the three other decisions before the Indiana Supreme Court, the court of appeals affirmed the trial court judgments and upheld the constitutionality of the two-year occurrence-based statute of limitations provision of Indiana’s Medical Malpractice Act.<sup>15</sup> The basis of the court of appeals decision was articulated by Judge Staton in *Johnson v. Gupta*.<sup>16</sup> In his opinion, Judge Staton reiterated the right of the legislature to limit a cause of action in tort and stated further that the legislature “made the policy decision that, to ensure the availability of malpractice insurance for Indiana doctors, and, in turn, medical services for Indiana residents, a more stringent statute of limitations was necessary.”<sup>17</sup> In so ruling, Judge Staton relied on the Indiana Supreme Court’s decision in *Johnson v. St. Vincent Hospital, Inc.*<sup>18</sup> which initially upheld the constitutionality of the occurrence-based statute of limitations and other provisions of Indiana’s Medical Malpractice Act. Giving deference to the legislature’s balancing of the competing interests, Judge Staton for the court of appeals also rejected the claim of a violation of the Indiana Constitution’s Equal Privileges and Immunities Clause, stating that “[t]his disparate treatment is a response to the reduction in health care services available to Indiana residents and the financial uncertainties in the health care industry.”<sup>19</sup>

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9. *Id.*

10. IND. CONST. art I, § 12.

11. 674 N.E.2d at 1023-26.

12. TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01 (West 1997).

13. TEX. CONST. art. I, § 13.

14. 674 N.E.2d at 1023-26.

15. *Johnson v. Gupta*, 682 N.E.2d 823 (Ind. Ct. App. 1997); *Harris v. Raymond*, 680 N.E.2d 551 (Ind. Ct. App. 1997); *Jordan v. Read*, 677 N.E.2d 640 (Ind. Ct. App. 1997) (Unpublished Memorandum Decision).

16. 682 N.E.2d at 823.

17. *Id.* at 830.

18. 404 N.E.2d 585 (Ind. 1980); *see also Cha v. Warnick*, 476 N.E.2d 109 (Ind. 1985); *Toth v. Lenk*, 330 N.E.2d 336 (Ind. 1975); *Ledbetter v. Hunter*, 652 N.E.2d 543 (Ind. Ct. App. 1995); *Carmichael v. Silbert*, 422 N.E.2d 1330 (Ind. Ct. App. 1981).

19. 682 N.E.2d at 830.

## I. INDIANA'S MEDICAL MALPRACTICE ACT

In the early 1970's, Indiana, with the rest of the nation, experienced a crisis in the cost and availability of medical malpractice insurance for health care providers.<sup>20</sup> As did other states, Indiana experienced sharp increases in the size and frequency of medical malpractice claims.<sup>21</sup> Consequently, the availability of medical malpractice insurance for physicians and hospitals decreased sharply in the mid-1970s.<sup>22</sup>

The key characteristics of claims affecting the availability and affordability of medical malpractice insurance are frequency and severity (i.e., size) of claims. Increases in claim frequency and severity did much to trigger the two malpractice crises of the 1970s and 1980s.<sup>23</sup> Indiana's trends in frequency and severity of claims from 1975 through 1988 were similar to national trends.<sup>24</sup> Not surprisingly, most legislated tort and insurance reforms are aimed at controlling the frequency and severity of claims.

In January 1975, Governor Otis R. Bowen, called for reform of the common law tort system for medical malpractice.<sup>25</sup> On April 17, 1975, the Indiana General Assembly enacted the Indiana Medical Malpractice Act (the "Act").<sup>26</sup> The Act's purpose was to provide health care professionals and institutions with affordable medical malpractice insurance and thus assure the continued

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20. See Eleanor D. Kinney et al., *Indiana's Medical Malpractice Act: Results of a Three Year Study*, 24 IND. L. REV. 1275, 1276-77 (1991); Otis Bowen, *Medical Malpractice Law in Indiana*, 11 J. LEGIS. 15 (1984); see also Patricia Danzon, *The Frequency and Severity of Medical Malpractice Claims: New Evidence*, 49 L. & CONTEMP. PROB. 57 (1986); Frank A. Sloan, *State Responses to the Malpractice Insurance "Crisis" of the 1970s: An Empirical Assessment*, 9 J. HEALTH POL., POL'Y & L. 629 (1985).

21. Frequency of claims filed against physicians between 1970 and 1975 increased 42% and the average damage award increased from \$12,993 in 1970 to \$34,297 in 1975. Malpractice insurance premiums rose 410% for physicians between 1970 and 1975. INDIANA MED. MALPRACTICE STUDY COMM'N, FINAL REPORT OF THE MEDICAL MALPRACTICE STUDY COMM'N 5-6 (1976) [hereinafter FINAL REPORT OF THE MEDICAL MALPRACTICE STUDY COMM'N].

22. FINAL REPORT OF THE MEDICAL MALPRACTICE STUDY COMM'N, *supra* note 21.

23. See generally Eleanor D. Kinney, *Malpractice Reform in the 1990s: Past Disappointments, Future Success?*, 20 J. HEALTH POL., POL'Y & L. 99 (1991); Randall R. Bovbjerg, *Legislation on Medical Malpractice: Further Developments and a Preliminary Report Card*, 22 U.C. DAVIS L. REV. 499 (1989).

24. U.S. GAO, MEDICAL MALPRACTICE: CASE STUDY ON INDIANA (1986) [hereinafter U.S. GAO, CASE STUDY ON INDIANA]; U.S. GAO, SIX CASE STUDIES SHOW CLAIMS AND INSURANCE COSTS STILL RISE DESPITE REFORMS (1986); Geoffrey Segar, *Background of, Preparation of, and Passage of the Indiana Medical Malpractice Act*, in HOOSIER HOSPITAL ECONOMICS & PUBLIC POLICY: A COLLECTION OF HISTORICAL ESSAYS 69 (Ind. Hosp. Ass'n ed., 1995).

25. GOVERNOR OTIS R. BOWEN, MESSAGE TO THE GENERAL ASSEMBLY, STATE OF INDIANA, JOURNAL OF THE HOUSE 31-36 (Jan. 9, 1975).

26. Act of Apr. 17, 1975, Pub. L. No. 146-1975, 1975 Ind. Acts 854 (codified as amended at IND. CODE §§ 27-12-1-1 to -18-2 (1993)); see Segar, *supra* note 24, at 69-72.

availability of health care services in the state.<sup>27</sup>

Indiana's malpractice reforms were among the first comprehensive malpractice reforms in the nation and have been consistently maintained since 1975.<sup>28</sup> They have withstood several constitutional challenges. Indiana's reforms have also gained national attention.<sup>29</sup> Several states have adopted reforms patterned after Indiana.<sup>30</sup>

The Act contains three major reforms: (1) a comprehensive cap on damages,<sup>31</sup> (2) mandated medical review before trial,<sup>32</sup> and (3) a state-run Patient Compensation Fund to pay large claims.<sup>33</sup> Eligible health care providers, exhaustively defined in the statute,<sup>34</sup> participate voluntarily by proving financial responsibility, i.e., a specified level of primary malpractice insurance coverage, and by paying a surcharge on that primary coverage to finance the Patient Compensation Fund.<sup>35</sup>

Indiana's medical malpractice reform legislation, like most malpractice reforms that state legislatures have adopted in recent years, seeks to limit the frequency and severity of malpractice claims—the two factors that influence the cost of malpractice liability insurance for providers.<sup>36</sup> For example, Indiana's cap on damages is designed to control the size of claims and, in particular, the occurrence of unpredictable catastrophic claims. Other Indiana reform designed to limit claim size are the limitation on recoveries from collateral sources and

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27. H.R. 1460, 99th Gen. Assembly, 1st Sess. § 1(a)-(j) (1975); *see Johnson v. St. Vincent's Hosp.*, 404 N.E.2d 585 (Ind. 1980).

28. *See Kinney et al., supra* note 20, at 1276; Catherine Schick Hurlbut, Note, *Constitutionality of the Indiana Medical Malpractice Act: Re-Evaluated*, 19 VAL. U. L. REV. 493, 494 (1985); James Kemper et al., *Reform Revisited: A Review of the Indiana Medical Malpractice Act Ten Years Later*, 19 IND. L. REV. 1129, 1131 (1986).

29. For example, in 1987, the United States Department of Health and Human Services, under the guidance of then Secretary Otis Bowen, recommended that states adopt malpractice reforms patterned after Indiana's. *See DEP'T OF HEALTH & HUMAN SERVICES, REPORT ON THE TASK FORCE ON MEDICAL LIABILITY AND MALPRACTICE* (1987); DEP'T OF HEALTH & HUMAN SERVICES, *DESCRIPTION OF MODEL HEALTH CARE PROVIDER LIABILITY REFORM ACT* (1987).

30. *See, e.g.*, KAN. STAT. ANN. § 60.3407 (Supp. 1989); KAN. STAT. ANN. § 65.490 (1985); LA. REV. STAT. ANN. § 40.1299.47 (Supp. 1990); NEB. REV. STAT. § 44-1840 & 40.1299.42 (Supp. 1990); *see Bovbjerg, supra* note 23, at 521-31.

31. Through 1989, the cap was \$500,000. IND. CODE § 16-9.5-2-2 (repealed 1993). The legislature raised the cap to \$750,000 for claims filed after January 1, 1990, presumably to address perceived inequities in the system for large claimants. Act of May 2, 1989, Pub. L. No. 189-1989, 1989 Ind. Acts 1538 (codified as amended at IND. CODE § 16-9.5-2-2(a) (1990)). In 1998, the legislature raised the cap to \$1.25 million effective July 1, 1999. Act of March 13, 1998, Pub. L. No. 111-1998, 1998 Ind. Acts 390 (to be codified at IND. CODE § 27-12-14-3).

32. *See IND. CODE §§ 27-12-8-1 to -10-26 (1993).*

33. *Id. §§ 27-12-6-1 to -7.*

34. *Id. § 27-12-2-14.*

35. *Id. § 27-12-5-3.*

36. *See Kinney, supra* note 23, at 101-02. *See generally Bovbjerg, supra* note 23.

allowing third party payers to recover from awards.<sup>37</sup> Several reforms, such as the Medical Review panel, are designed to limit the frequency of claims. The two-year occurrence-based statute of limitations is also designed to reduce claim frequency. Some tentative evidence suggests that it is effective in doing so.<sup>38</sup>

## II. TIME FOR A REASSESSMENT?

The adoption of tort reform in any field, including malpractice, involves a balancing of interests among injured claimants, tortfeasors and the insurers that effectively finance the tort claim awards and settlements of tortfeasors. If the balance is struck too far in favor of tortfeasors and their insurers, tort claimants have reduced access to fair compensation for their injuries. If the balance is struck too far in favor of tort claimants, the ability of tortfeasors and their insurers to finance tort claim awards and settlements is compromised.

Clearly, the Indiana legislature was concerned that the balance was struck too far in favor of malpractice claimants when it enacted its malpractice reforms in 1975.<sup>39</sup> Significant evidence also suggests that the legislature may have been right in this conclusion. Specifically, shortly after enactment, medical malpractice premiums in Indiana dropped and insurance became readily obtainable again, and Indiana has enjoyed relatively low malpractice premiums since.<sup>40</sup> Perhaps more importantly, Indiana enjoyed stability in the affordability and availability of malpractice insurance during the mid-1980s when other states experienced a "crisis" in this area.<sup>41</sup> Furthermore, Indiana's health care providers and insurers are highly satisfied with the system.<sup>42</sup>

In addition, important evidence from an evaluation of Indiana's Medical Malpractice Act in the 1980s,<sup>43</sup> indicates that Indiana's reforms were unexpectedly quite generous to claimants. In assessing the operation of Indiana's cap, comparisons with Ohio and Michigan are instructive. Unlike Indiana, at the time Michigan and Ohio had adopted malpractice reforms only sporadically and had never implemented a damage cap; with respect to other, more general tort

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37. IND. CODE § 31-4-36-1 (1993).

38. See Randall R. Bovbjerg & Joel M. Schumm, *Judicial Policy and Quantitative Research: Indiana's Statute of Limitations for Medical Practitioners*, 31 IND. L. REV. 1051 (1998).

39. See Kinney et al., *supra* note 20, at 1276-77.

40. See U.S. GAO, CASE STUDY ON INDIANA, *supra* note 24.

41. U.S. GAO, CASE STUDY ON INDIANA, *supra* note 24; U.S. GAO, MEDICAL MALPRACTICE INSURANCE COSTS INCREASED BUT VARIED AMONG PHYSICIANS AND HOSPITALS (1986).

42. U.S. GAO, CASE STUDY ON INDIANA, *supra* note 24.

43. William P. Gronfein & Eleanor D. Kinney, *Controlling Large Medical Malpractice Claims: The Unexpected Impact of Damage Caps*, 16 J. HEALTH POL. POL'Y & L. 441 (1991).

Data on Michigan and Ohio claims were all large (>\$100,000) claims filed with the Medical Protective Company, Fort Wayne, Indiana, between 1977 through 1988. For the relevant period, the Medical Protective Company had about one-third of the market in Michigan and Ohio. *Id.* at 445.

reforms, all three states were similar.<sup>44</sup> Nevertheless, between 1995 and 1988, the amount of compensation going to claimants with large malpractice payments in Indiana was, on average, substantially higher than in Michigan and Ohio: Indiana's mean large claim (>\$100,000) severity between 1975 and 1988 was \$404,832; Michigan's was \$290,022 and Ohio's, \$303,220.<sup>45</sup> The median payment for large claims (>\$100,000) was \$435,283 for Indiana, \$180,000 for Michigan and \$200,000 for Ohio.<sup>46</sup> Further, 27.9% of cases paid from Indiana's Patient Compensation Fund received the maximum allowable payment of \$500,000 while only 13% of Michigan and Ohio claims were paid at this level or above.<sup>47</sup>

It should be emphasized that there has been no empirical study of the Act since 1990 to confirm whether Indiana's system still operates in this fashion. One subsequent study, which compared Indiana with Illinois, found that, despite Indiana's reforms, Indiana and Illinois had similar patterns of health care expenditure inflation suggesting that Indiana's reforms have not affected health system costs.<sup>48</sup> In an analysis of Indiana data, Randall Bovbjerg found no difference in patterns of health care expenditures and rates of physicians per population in Indiana before and after the Act.<sup>49</sup>

Nevertheless, there do remain issues about Indiana's Medical Malpractice Act with respect to claimants. For example, there is evidence that malpractice claimants with capped damage awards often receive unjustly small compensation after third party payers receive payment from the award for their expenditures on the claimant's behalf.<sup>50</sup> There have been instances where claimants have received very little from a large recovery because third parties as well as the plaintiff's attorney have been paid first.<sup>51</sup> The operation of these rights of third parties in a capped system indeed raises fundamental questions of fairness as Indiana's actual experience demonstrates.

Some anecdotal reports raise concerns as well.<sup>52</sup> Pulitzer Prize-winning articles in June 1990 reported consumer concerns about whether the Act promotes the interests of providers and insurers over those of claimants.<sup>53</sup> In

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44. *Id.* at 443-44.

45. *Id.* at 447 (Table 2).

46. *Id.*

47. *Id.* at 447-48.

48. David Morrison, *In Search of Savings: Caps on Jury Verdicts are Not a Solution to Health Care Cost Crisis*, 7 LOY. CONSUMER L. REP. 141 (1995).

49. Randall R. Bovbjerg, *Lessons for Tort Reform from Indiana*, 16 J. HEALTH POL. POL'Y & L. 465 (1991).

50. See Kinney et al., *supra* note 20, at 1300-01.

51. *Id.* at 1301.

52. See, e.g., Isabel Wilkerson, *Indiana Law at Center of Malpractice Debate*, N.Y. TIMES, Aug. 20, 1990, at A13.

53. See Joseph T. Hallinan & Susan M. Headden, *A Case of Neglect: Medical Malpractice in Indiana*, INDIANAPOLIS STAR, Jun. 24, 1990, at 1; Joseph T. Headden & Susan M. Hallinan, *State Failing to Crack Down on Malpractice*, INDIANAPOLIS STAR, Jun. 25, 1990, at 1; Joseph T.

1995, a lobbyist for the Insurance Institute of Indiana reported a harrowing story of his own experience trying to recover adequate damages for catastrophic injury from malpractice in the face of Indiana's cap.<sup>54</sup> A sociological study involving interviews of claimants found considerable dissatisfaction with the Act among many claimants.<sup>55</sup>

One area of great concern has been the fairness of the two-year, occurrence-based statute of limitations for injured parties who discover the injury after the statute has tolled as well as for minors.<sup>56</sup> Indeed, when the court of appeals issued its opinion in *Martin v. Richey*, an editorial in the *Indianapolis News* called for a reform of the Act's statute of limitations.<sup>57</sup>

This small symposium commemorates the occasion when the Indiana Supreme Court is called on to decide whether the two-year occurrence-based statute of limitations for medical malpractice claims violates Indiana's Constitution. Two types of information should inform the court's decision. First are legal argument and precedent. Second is empirical information about the operation of the legal rule that indicates its appropriateness as a policy matter.

The Brief of Amicus Curiae Indiana Trial Lawyers Association<sup>58</sup> presents the arguments that the malpractice limitations period violates the Indiana Constitution and justifies the overturning of a substantial body of Indiana case law to the contrary. The second brief, Brief of Amicus Curiae Indiana State Medical Association,<sup>59</sup> presents the arguments and precedents in support of the current limitations provision. These briefs are reproduced in this Symposium as Appendixes. Further, an Article by Randall R. Bovbjerg and Joel M. Schumm reviews the empirical evidence on medical malpractice focusing on Indiana and more especially, on the impact of short occurrence-based statutes of limitations on the frequency of claims and the cost and availability of medical liability insurance.<sup>60</sup>

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Hallinan & Susan M. Headden, *Malpractice Laws Stacked against Victims: Doctors, Insurance Companies Reap Biggest Benefits*, INDIANAPOLIS STAR, Jun. 26, 1990, at 1.

54. Frank Cornelius, *Crushed by my Own Reform*, N.Y. TIMES, Oct. 7, 1994, at A31; see also Eileen Ambrose, *Terminally Ill Man Fights Against Malpractice Law He Helped Pass: Cap on Damages is a Bad Idea, He Says*, INDIANAPOLIS NEWS, Mar. 1, 1995, at A1.

55. William Gronfein & Eleanor Kinney, *Bringing the Patient Back In: The Rhetoric of Victimization and Medical Malpractice*, 6 PERSP. ON SOC. PROBS. 47 (1994).

56. See Scott A. DeVries, Note, *Medical Malpractice Acts' Statutes of Limitation as They Apply to Minors: Are They Proper?*, 28 IND. L. REV. 413 (1995).

57. Editorial, *Surgery for Malpractice Law*, INDIANAPOLIS NEWS, Aug. 23, 1997, at A4; see also Gregory Weaver, *State's Malpractice Laws Coming under Siege: Recent Appeals Rulings Have Given Strength to Lawsuits, but Fate of the Law May Lie with the State Supreme Court*, INDIANAPOLIS STAR, Aug. 17, 1997, at A1.

58. Brief of Amicus Curiae Indiana Trial Lawyers Association (in opposition to transfer), *Martin v. Richey*, 674 N.E.2d 1015 (Ind. Ct. App. 1997), reprinted in Appendix 1, 31 IND. L. REV. 1089 (1998).

59. Brief of Amicus Curiae Indiana State Medical Association (in support of transfer), *Martin v. Richey*, 674 N.E.2d 1015 (Ind. Ct. App. 1997), reprinted in Appendix 2, 31 IND. L. REV. 10959 (1998).

60. See Bovbjerg & Schumm, *supra* note 38.



# JUDICIAL POLICY AND QUANTITATIVE RESEARCH: INDIANA'S STATUTE OF LIMITATIONS FOR MEDICAL PRACTITIONERS

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## INTRODUCTION

More than twenty years after the Indiana General Assembly enacted comprehensive medical malpractice reform in 1975,<sup>1</sup> the Indiana Supreme Court heard oral argument in four cases<sup>2</sup> challenging the constitutionality of Indiana's special occurrence-based statute of limitations for medical liability.<sup>3</sup> In deciding whether medical malpractice claims should be subjected to a more stringent statute of limitation than all other tort claims, the supreme court has been asked to consider numerous historical and constitutional claims, but little empirical evidence, either about the problems that precipitated reform or the results that it produced.

This Article attempts to fill in these gaps. We sketch the history of empirical information on medical malpractice issues (Part I), present new information about pre-reform patterns of malpractice claiming and the likely effects of the reform (Part II), and consider the implications for judicial policy (Part III). We conclude that a sizable block of late-discovered claims against physicians and hospitals may have been barred by Indiana's statute of limitations. We argue that the judiciary should create for itself better data systems with which to manage its cases and evaluate future controversies about dispute resolution.

Medical malpractice reform remains an active concern in many other states as well, despite the absence of anything like the insurance "crisis" that drove

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1. Act of Apr. 17, 1975, No. 146, 1975 Ind. Acts 854 (codified as amended at IND. CODE §§ 27-12-1 to 27-12-18 (1993)).

2. *Johnson v. Gupta*, 682 N.E.2d 827 (Ind. Ct. App. 1997), *petition for transfer filed*, Aug. 13, 1997; *Harris v. Raymond*, 680 N.E.2d 551 (Ind. Ct. App. 1997), *petition for transfer filed*, July 11, 1997; *Martin v. Richey*, 674 N.E.2d 1015 (Ind. Ct. App. 1997), *petition for transfer filed*, July 10, 1997; *Jordan v. Read*, No. 49A04-9606-CV-256 (Ind. Ct. App. Mar. 18, 1997), *petition for transfer filed*, April 16, 1997.

3. IND. CODE § 27-12-7-1 (b) (1993).

reforms in the mid-1970s and 1980s. Liability reform in its own right has been kept on legislative agendas by defense and insurance interest groups, with medical practitioners in a lead role, as well as by general proposals for health systems reform, including malpractice.<sup>4</sup> Over time, numbers have played an increasingly large role in the public debates, particularly evidence on insurance premiums and defensive medicine. In practical policy making, however, anecdote and personal experience continue to dominate perceptions, and large policy arguments turn on very small amounts of quantitative evidence.<sup>5</sup> This Article blends empirical research with legal policy analysis and argument.

## I. POLICY-MAKING AND QUANTITATIVE INFORMATION

### A. *The First Medical Malpractice Crisis: Policy-Making in an Information Vacuum*

Medical liability first came to public prominence during the insurance crisis of the mid-1970s. At this time, especially in the media centers of New York and California, liability insurers awoke to a sharp upward trend in the number of claims for professional liability and the number and amount of verdicts. In response, some insurers exited the market, while others demanded very large premium increases,<sup>6</sup> some quitting the market after not getting as much as they thought they needed. The first round of "tort reform" occurred at that time.<sup>7</sup>

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4. Active tort-reform-promoting groups include the Health Care Liability Alliance, 1130 Connecticut Ave, N.W., Suite 800, Washington DC 20036 and the American Tort Reform Association, 1212 New York Ave., N.W., Suite 515, Washington, DC 20005. The latter's website tracks state enactments <<http://www.aaabiz.com/ATRA>>. Tort reform has also figured in many proposals for health systems reform in the early 1990s, from both executive and Congressional sources and under both Republican and Democratic administrations. See Eleanor D. Kinney, *Malpractice Reform in the 1990s: Past Disappointments, Future Success?*, 20 J. HEALTH POL. POL'Y & L. 99, 112-19 (1995) (thorough review of legislative proposals through mid 1994) and Randall R. Bovbjerg, *Promoting Quality and Preventing Malpractice: Assessing the Health Security Act*, 19 J. HEALTH POL. POL'Y & L. 207 (1994) (Clinton proposals in particular). Tort reform for medical providers, though not of the statute of limitations, also comprised part of Congressional Republicans' 1994-95 "Contract with America," has since been added as an amendment to budget bills (unsuccessfully), and as this Article is being edited has been proposed for the House Republicans' version of a "patient bill of rights;" see, e.g., American Health Line, National Journal's Daily Briefing, *Politics & Policy—House Republicans: Unveil Patients' Rights Bill* (visited June 25, 1998) <<http://cloakroom.com>>.

5. See generally Stephen Zuckerman et al., *Information on Malpractice: A Review of Empirical Research on Major Policy Issues*, 49 LAW & CONTEMP. PROBS. 85 (1986).

6. See generally James R. Posner, *Trends in Medical Malpractice Insurance, 1970-1975*, 49 LAW & CONTEMP. PROBS. 37, 38-39 (1986) (noting some states had premium increases of up to 500%). See also *infra* note.

7. See generally Randall R. Bovbjerg, *Legislation on Medical Malpractice: Further Developments and a Preliminary Report Card*, 22 U.C. DAVIS L. REV. 499 (1989). Fig. 1, *id.* at

Compared with other states, Indiana's response came faster, its reforms were more comprehensive, and the provisions were more stringent. In January 1975, Governor Otis Bowen, M.D., called for action in his State of the State message; and the General Assembly enacted comprehensive reform in April of the same year. The key provisions of the 1975 Medical Malpractice Act were (1) a comprehensive cap on all damages, (2) mandatory medical review before a panel of health care providers before filing suit, (3) a state-run insurance fund to pay large claims, and (4) a two-year, *occurrence-based* statute of limitations for adults and a longer statute of repose for children.<sup>8</sup> The reform clearly created a new and shorter period of limitations for children, running to a maximum of age eight. For adults it restated the pre-existing occurrence-based rule, evidently intending to prevent the judicial development of a "discovery rule" allowing long delays before lawsuit.<sup>9</sup>

Nationally, the widespread 1970s legislative debates were marked by a significant absence of broad-based, relevant, objective information about trends

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505, shows that for several medical specialties, national average premiums doubled or tripled in "real" terms, i.e., inflation-adjusted, between 1974 and 1975.

8. See *supra* note 1; see also Geoffrey Segar, *Background of, Preparation of, and Passage of the Indiana Medical Malpractice Act*, in HOOSIER HOSPITAL ECONOMICS AND PUBLIC POLICY: A COLLECTION OF HISTORICAL ESSAYS 69 (Ind. Hosp. Ass'n ed., 1995); Otis R. Bowen, *Medical Malpractice Law in Indiana*, 11 J. LEGIS. 15, 19-21 (1984); Eleanor D. Kinney et al., *Indiana's Medical Malpractice Act: Results of a Three-Year Study*, 24 IND. L. REV. 1275, 1277-78 (1991).

Nationally, malpractice reforms can be categorized as aiming at (1) insurance (such as giving notice of claims, joint underwriting associations, patient compensation funds, and other efforts to attempt to deal with the problem of availability and affordability of liability insurance), (2) medical quality (such as promoting peer review by immunizing it from legal claims of defamation, increasing disciplinary board powers, and creating the National Practitioner Data Bank and state analogs), and (3) tort law (addressing mainly(a) the number of claims, as through statutes of limitation and arbitration, (b) the amounts of payouts, notably through caps on awards and collateral source offset provisions, (c) plaintiffs' likelihood of winning, as through expert witness requirements and *res ipsa loquitur* restrictions, and (d) the functioning of judicial process, including new pre-calendar conference requirements and preferred scheduling for malpractice cases). See generally Bovbjerg, *supra* note 7, at 513-32.

9. The 1975 reform aimed mainly at suits on behalf of children. The Indiana Supreme Court had just ruled that the statute of limitations was tolled until the age of majority, *Chaffin v. Nicosia*, 310 N.E.2d 867 (Ind. 1974), thus allowing up to 23 years for a claim arising from childbirth. A 1941 malpractice reform had created the basic, two-year statute, running from the time of the "act, omission or neglect complained of," ch. 116, § 1 (Acts 1941), now codified at IND. CODE § 34-4-19-1 (1993). Indiana had to 1975 not developed a "discovery rule," although tolling the statute was relatively easy under a broadly conceived doctrine of "fraudulent concealment" by physicians, until termination of the physician-patient relationship. *Guy v. Schuldt*, 138 N.E.2d 891 (Ind. 1956); *Toth v. Lenk*, 330 N.E.2d 336 (Ind. App. 1975). The 1975 reformers were concerned to pre-empt further judicial creativity. The 1975 statute essentially repeated the 1941 starting point for limitation of malpractice claims, the "alleged act, omission or neglect" of a health care provider, but oddly did not repeal the prior law or address the existing concealment doctrine.

in injuries, claims, awards, and other effects of the liability system.<sup>10</sup> At the time, the federal Secretary's Commission had just done the first-ever series of studies on medical liability issues, nationwide, and one of the conclusions of the individual components of that study was that relatively little was known.<sup>11</sup>

In Indiana, just what problems legislators perceived, and with what basis in legislative evidence, is not reliably known. Indiana does not maintain formal legislative histories or even transcripts of committee hearings or floor debates on any proposed bills. Amid the general concern over availability of liability coverage, however, particular problems of late-filed litigation or changes in the discovery rule do not appear to have loomed large.<sup>12</sup>

Courts were soon called upon to consider the validity of some of the reforms. In upholding the constitutionality of many aspects of the 1975 Act five years after its passage, the Indiana Supreme Court noted the increase in the number of malpractice claims and large judgments at the time the Act was passed: "[T]he Legislature was undoubtedly moved because of its appraisal that the services of health care providers were being threatened and curtailed contrary to the health interests of the community because of the high cost and unavailability of liability insurance." The discussion of the statute of limitations was short and focused upon the shortening of time for children to bring suit. Medical providers were noted to be at "unique" risk of long-delayed claims, which was noted to confound the search for truth, and medical professionals were noted to be licensed, from which the legislature may have deemed them "entitled to a special degree of trust."<sup>13</sup>

Data slowly began to trickle into the information vacuum in which legislatures and courts were functioning. In the wake of the 1970s crisis, insurance regulators for the first time began to require carriers to report on malpractice as a line of coverage separate from general liability. Also begun were two notable empirical efforts. One was the major study of medical injury and negligence in hospital medical records undertaken by Don Harper Mills and colleagues with support from the California Medical and Hospitals Associations.<sup>14</sup> The other was a three-year effort by the National Association of

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10. See generally Zuckerman et al., *supra* note 5, at 87.

11. U.S. DEPT. OF HEALTH, EDUCATION, AND WELFARE, REPORT OF THE SECRETARY'S COMMISSION ON MEDICAL MALPRACTICE & APPENDIX (1973).

12. Reform proponents' legislative intent was indicated by ten proposed findings contained in an earlier version of House Bill 1460. It set out ten findings about the effect of insurance crisis on Indiana health care providers, patients, and citizens. None was directly relevant to the statute of limitations. See section 1 of H.R. 1460, 99th Gen. Assembly, 1st Sess. (Ind. 1975) (version of the bill as printed on March 6, 1975), reproduced in Appendix, *infra*. These findings were included in the version of the bill that was favorably reported out of the House Committee on Labor and the Economy (March 5, 1975), but were removed before engrossment by the Senate (April 2, 1975).

13. *Johnson v. St. Vincent Hosp., Inc.*, 404 N.E.2d 585, 594, 604 (Ind. 1980).

14. Project results appear in an out-of-print book, DON H. MILLS ET AL., REPORT ON THE MEDICAL INSURANCE FEASIBILITY STUDY (1977). More accessible is a project summary, Don Harper Mills, *Medical Insurance Feasibility Study: A Technical Summary*, 128 WEST. J. MED. 360

Insurance Commissioners (NAIC) to gather and tabulate information on nearly every medical liability claim closed by all but the country's smallest medical liability insurers.<sup>15</sup> The availability of these data attracted the attention of empirical researchers, notably Patricia Munch Danzon, whose path-breaking studies from the Rand Corporation in the late 1970s and early 1980s first analyzed the effects of tort reform, among other issues.<sup>16</sup> Despite these advances, most information in public arenas and legislative debates came from the same proprietary sources that had dominated debate at the time of the mid-1970s crisis, namely, medical societies, insurers, and the plaintiffs' bar.

### *B. The Second Crisis: Further Reforms and More Research*

The second nationally noticed crisis in liability insurance arose in the mid-1980s. Problems in liability insurance this time were more general than malpractice-specific. In great measure because medical and hospital professionals had founded their own insurance companies, the problem of securing malpractice coverage was not significant in the mid-1980s.<sup>17</sup> The problem was instead a rapid increase in premiums—less sharp a rise than in the 1970s, but starting from a higher base level—to putatively unaffordable levels.<sup>18</sup> In the 1980s, moreover, the need for premium increases became apparent much more quickly, so that there was much less disruption to insurers' continued participation in the market.

This crisis also prompted tort reform—often for all personal injuries rather than just malpractice—as well as further development of empirical research. As in the 1970s, a series of state-specific and national task forces or commissions wrote reports,<sup>19</sup> and the attention of additional empirical and other researchers was drawn to the area.

Nonetheless, legislative debates continued to be quite contentious, in a kind of adversary legislative process which echoed the adversarial nature of the courtroom, and which continues to this day. Plaintiffs and their lawyers argued

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(1978).

15. NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS, MALPRACTICE CLAIMS: FINAL COMPILATION (M. Patricia Sowka ed., 1980) [hereinafter NAIC].

16. Professor Danzon's work of this era is well summarized in her book. *See* PATRICIA M. DANZON, MEDICAL MALPRACTICE: THEORY, EVIDENCE, AND PUBLIC POLICY (1985).

17. *See generally* Posner, *supra* note 6, at 39; Bovbjerg, *supra* note 7 at 503.

18. *See* Posner, *supra* note 6, at 47; Bovbjerg, *supra* note 7 at 502-06 (Fig. 1 at 505 shows approximate doubling of five medical specialties' premiums in "real" terms, i.e., inflation-adjusted, between 1982 and 1985).

19. *See, e.g.*, GOVERNOR'S TASK FORCE ON MEDICAL MALPRACTICE INSURANCE, REPORT OF THE GOVERNOR'S TASK FORCE ON MEDICAL MALPRACTICE INSURANCE—STATE OF COLORADO (1988); ACADEMIC TASK FORCE FOR REVIEW OF THE INSURANCE AND TORT SYSTEMS, PRELIMINARY REPORT ON MEDICAL MALPRACTICE AND MEDICAL MALPRACTICE RECOMMENDATIONS (1987); REPORT AND RECOMMENDATIONS OF THE GOVERNOR'S TASK FORCE ON MEDICAL MALPRACTICE (1986).

passionately on one side, doctors and their insurers on the other.<sup>20</sup> The 1980s legislative response followed the lines set in the 1970s, and states like Indiana that had enacted major reforms in the 1970s generally enacted only minor ones in the 1980s. The entire "wave" of 1980s reform was rather broader than that of the 1970s, in several ways. Many provisions applied not just to malpractice but to all personal injuries or all torts. For the first time, moreover, there was federal action on insurance and medical quality. Finally, some tort reforms departed further from traditional tort principles. Most notably, Virginia and Florida enacted an entirely new approach to medical injury, a limited "no fault" system for handling very severely neurologically impaired newborns.<sup>21</sup>

What explains the presence or absence of reliable empirical evidence? To paraphrase realtors, the three most important things about empirical research are data, data, and data. It is clearly not possible to do empirical research without some numbers. Furthermore, systematically gathered and carefully processed numbers are necessary for good work, and most of the basic statistics reside in proprietary rather than public databases. For issues of medical utilization, even by the early 1970s, there were enough public databases to allow the issuance of health care data books. But not for medical liability or liability insurance, where there are no such public data on medical injury, medical liability insurance, or medical litigation. Most people new to these issues are astonished to learn that it is not even reliably known how many claims of medical liability are made each year.<sup>22</sup>

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20. The legislative combatants naturally also take opposing positions in the *Martin* litigation challenging the legislation. The polarity of the contending views is well-illustrated by two of the amicus briefs filed in the case, which are reproduced in this symposium. *See* Brief of Amicus Curiae Indiana Trial Lawyers Association (in opposition to petition to transfer), *Martin v. Richey*, 674 N.E.2d 1015 (Ind. Ct. App. 1997), *reprinted in Appendix 1*, 31 IND. L. REV. 1089 (1998) [hereinafter ITLA brief]; Brief of Amicus Curiae Indiana State Medical Association (in support of petition to transfer), *Martin v. Richey*, 674 N.E.2d 1015 (Ind. Ct. App. 1997), *reprinted in Appendix 2*, 31 IND. L. REV. 1099 (1998) [hereinafter ISMA brief]. The opposing points of view are also discussed in *infra* notes 43-46 and accompanying text.

21. Reforms addressed insurance, law, and quality of medical care, as discussed in greater detail in Bovbjerg, *supra* note 7, at 532-40. For the no-fault statutes, see VA. CODE ANN. § 38.2-5000 to -5002 (Michie 1994); FLA. STAT. ANN. § 766.301 to -.316 (West 1997). For empirical information on no-fault performance, see Randall R. Bovbjerg & Frank A. Sloan, *No Fault for Medical Injury: Theory and Evidence*, 67 U. CIN. L. REV. (forthcoming 1998) (policy overview from major study that includes information from study's five other empirical publications); Jill Horwitz & Troyen A. Brennan, *No-Fault Compensation for Medical Injury: A Case Study*, HEALTH AFF., Winter 1995, at 164.

22. Data from the Insurance Services Offices were considered nationally representative in the 1970s, *see infra* notes 47, 49 and accompanying text, but no longer. Studies of claims trends since have required data collection. Even the word "claim" can be misunderstood. Claims are files opened by insurers concerned with whether they need to investigate and potentially defend an ultimate legal action. They may be opened because of a report from an insured, for example, a doctor or hospital staffer, or are based on other information. In one very large database in Florida,

If data are the main prerequisite, the second pillar of empirical research is researchers, whose presence presupposes research support or funding. Since the mid-1980s, far more scholars from different disciplines have addressed medical liability issues, usually as an offshoot of some other interest. Some have come from health economics, others from jury-verdict research, general interest in the phenomena of law and society, and the conventional disciplines of law or medicine.

Major studies have examined the universe of hospital treatment, medical injuries, and legally cognizable negligence. One used 1974 hospital records in California<sup>23</sup> and the other 1984 hospital records in New York.<sup>24</sup> In each case it was found that about 4% of hospital charts contained evidence of bad outcomes that the researchers were confident were caused by medical care, one percentage point by negligent medical care.<sup>25</sup> Far fewer cases were brought as liability insurance claims or lawsuits.<sup>26</sup>

The General Accounting Office studied a national sample of claims closed in 1984.<sup>27</sup> Other studies have considered the resolution of these cases by the legal system and the almost total lack of standards and information for juries and judges acting as factfinders to draw upon in determining damages.<sup>28</sup> Finally, numerous attempts have been made to document "defensive medicine."<sup>29</sup>

Medical malpractice policy today can draw upon research and researchers, much more than at the time of even the second crisis. There is objective information available on many malpractice issues, and research has become more sophisticated. Researchers have moved beyond mere legal writing and limited descriptive research to more useful—and more difficult to perform—generalizable descriptive research and analysis, nationally and in Indiana.<sup>30</sup>

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about 40% of claims files closed have been found to consist of these notice type claims in which no claimant actually came forward with a request for money and the insurer spent no significant amount of money on investigation. Randall R. Bovbjerg & Kenneth R. Petronis, *The Relationship Between Physicians' Malpractice Claims History and Later Claims: Does the Past Predict the Future?*, 272 JAMA 1421, 1423 (1994).

23. The California Medical Association study is discussed in considerable detail in DANZON, *supra* note 16, at 19-29.

24. A. Russell Localio et al., *Relation Between Malpractice Claims and Adverse Events Due to Negligence*, 325 NEW ENG. J. MED. 245 (1991); Troyen A. Brennan et al., *Incidence of Adverse Events and Negligence in Hospitalized Patients*, 324 NEW ENG. J. MED. 370 (1991).

25. Brennan et al., *supra* note 24, at 371; DANZON, *supra* note 16, at 20.

26. DANZON, *supra* note 16, at 24; Localio et al., *supra* note 24, at 249.

27. U.S. GAO, *CHARACTERISTICS OF CLAIMS CLOSED IN 1984* (1987).

28. See generally Randall R. Bovbjerg et al., *Valuing Life and Limb in Tort: Scheduling Pain and Suffering*, 83 NW. U. L. REV. 908, 912 (1989).

29. See generally U.S. CONGRESS, OFFICE OF TECHNOLOGY ASSESSMENT, *DEFENSIVE MEDICINE AND MEDICAL MALPRACTICE* (1994); Randall R. Bovbjerg et al., *Defensive Medicine and Tort Reform: New Evidence in an Old Bottle*, 21 J. HEALTH POL. POL'Y & L. 267 (1996).

30. Professor Danzon's use of multivariate regression to assess the effect of various tort

At the time that the Indiana and other early reforms were enacted, their likely effects were simply not known. Today, however, in considering the constitutionality of certain malpractice reforms, courts may have a body of objective empirical evidence available for their consideration. This Article next explores—and expands upon—empirical evidence relating to the occurrence-based statute of limitations whose constitutionality is presently before the Indiana Supreme Court.

## II. ASSESSING INDIANA'S OCCURRENCE-BASED STATUTE OF LIMITATIONS

### *A. The Policy Balance to Be Struck*

Lengthening a statute of limitations through a discovery rule increases perceived fairness to arguably injured patients unable to discover their injuries quickly and arguably increases deterrence for medical practitioners by making them pay for negligent care no matter when it comes to light.<sup>31</sup> A shorter, occurrence-based statute increases perceived fairness to defendant doctors at risk of erroneous liability findings based on stale evidence and hindsight medical testimony, while encouraging *patients* allegedly injured by malpractice to act decisively, rehabilitate themselves to the extent possible, and generally “get on with their lives.”<sup>32</sup> A fixed time limit is a rule of judicial economy as well. Having to argue out the freshness or staleness of evidence in each case would make judicial process slower and more costly.

There is also a more subtle cost of longer statutes of limitations. They increase the cost of liability insurance by even more than the actuarially expected

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reforms is a good example of sophisticated analysis across the United States. *See, e.g.*, Patricia M. Danzon, *The Frequency and Severity of Medical Claims: New Evidence*, 49 LAW & CONTEMP. PROBS. 57 (1986). A three-year study addressed many empirical issues about the performance of reform in Indiana, though not including the statute of limitations. *See, e.g.*, William P. Gronfein & Eleanor D. Kinney, *Controlling Large Medical Malpractice Claims: The Unexpected Impact of Damage Caps*, 16 J. HEALTH POL. POL'Y & L. 411 (1991); Kinney, *supra* note 8 (reprinting Eleanor D. Kinney & William P. Gronfein, *Indiana's Malpractice System: No-Fault By Accident?*, 54 L & CONTEMP. PROBS. 167 (1991)). The entire study is reviewed by Professor Kinney's article in this Symposium, Eleanor D. Kinney, *Indiana's Medical Malpractice Reform Revisited: A Limited Constitutional Challenge*, 31 IND. L. REV. 1043, 1047-49 (1998).

31. Thus, by hypothesis, doctors should more readily change their practice to meet recognized standards because any mistakes will not go unrecognized just because they are old ones. One problem with this accurately applying expert testimony to older cases. *See infra* notes 125 and accompanying text. Another is that, if substandard care is not reliably discovered until years later, the deterrent “signal” may do no good if medical practice has already changed.

32. In the full universe of medical care and resulting injury, the problem of stale evidence seems even-handed: The passage of time could hurt either plaintiff or defense, as lost records or witnesses might hurt either side. However, where pro-plaintiff evidence is lost, an injury is unlikely to be discovered or a lawsuit brought. Accordingly, in the universe of legal claims actually seen by judges, older evidence is likely to disfavor defendants.

costs of defending and paying additional claims from older incidents because delay increases uncertainty and hence risk. To raise capital, insurers have to pay not just the normal rate of return required to finance a risk-free investment but also an added "risk premium" related to the variability of expected future claims (and hence the likelihood that capital will be lost).<sup>33</sup> Analogously, interest levels are higher for corporate bonds than for government securities, and higher still for lower-rated, riskier investments. The longer the statute of limitations, the more likely that actuaries will mis-predict social or medical-legal trends underlying future rates of claims.<sup>34</sup>

For example, if the Indiana statute of limitations is judicially altered, then claims will rise and insurance rates already set may prove to be inadequate (the state Patient Compensation Fund would be especially affected, as it covers the biggest claims, which are slowest to arise and be resolved, as considered below). Errors can also be made predicting the amounts of awards, including the likelihood that claimants will prevail in litigation, as well as inflation of wages and medical prices, along with changes in technology of medical treatment for injuries and disabilities.<sup>35</sup>

That this risk is large in malpractice is shown by the general shift in malpractice insurance markets since the early 1970s from "occurrence" coverage to "claims made" policies, which shorten the "long tail" of malpractice payouts.<sup>36</sup> Under occurrence coverage, premiums must be set to fund all claims arising from incidents occurring in the policy year, so insurers must predict both the rate of future claims and the amounts likely to be paid under them. Under claims made insurance, as the name implies, premiums cover only those claims made in the policy year. Thus, claims risk needs to be predicted only for a year in advance, only payout risk for longer, and the tail of delay to resolution of claims is shortened by the time between incident and report of claims.

There is an additional cost to shortening a statute of limitations as well. A very short statute may encourage concealment of negligent injuries by medical practitioners because it decreases the likelihood that independent evidence will be found during the shorter period and hence that they will be penalized for concealment. It is hard to see why the law should ever accept intentional concealment.<sup>37</sup>

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33. See generally FRANK A. SLOAN ET AL., INSURING MEDICAL MALPRACTICE (1991).

34. Professor Danzon's argument about this "sociolegal risk" is quite persuasive, if somewhat jargon-laden. See DANZON, *supra* note 16, at 175-78.

35. There is sociolegal risk in claims payments, as well as claims rates. *Id.* Legal doctrine may change unexpectedly as may jury attitudes about payment.

36. See, e.g., Posner, *supra* note 6, at 44-45.

37. See, e.g., Martin v. Richey, 674 N.E.2d 1015, 1027 (Ind. Ct. App. 1997).

The doctrine of fraudulent concealment operates to estop a defendant from asserting a statute of limitations defense when that person has concealed material facts from the plaintiff by deception or a violation of duty. This equitable doctrine was adopted in the case of *Guy v. Schuldt*, as a method of ameliorating the harshness of the stringent occurrence based statute.

Setting the length of a statute of limitations thus calls for striking a balance. Someone will be disadvantaged whichever way the statute is set, and there is no objectively “right” length. A legislature setting a statute to begin with or a court considering whether to hold it unconstitutional or to craft a judicial exception for a certain class of cases would therefore benefit from having information about the number and nature of people hurt as well as about the extent of the damage.

Clearly, the few claimants in *Martin v. Richey* and consolidated cases<sup>38</sup> have been hurt by the Indiana tort reform. If they were the only people in the state so hurt, one suspects that there would be no occasion to write this Article. The claimants’ constitutional argument draws force from the implication that they represent a class of other similarly situated people likewise denied a legal remedy. But, unlike a class action, there is no indication here of the size or attributes of the class.<sup>39</sup>

A related policy issue is whether the balance is different for different classes of lawsuits, which has implications for “equal privileges and immunities” analysis in Indiana (equal protection elsewhere). Common sense supported the common law distinction drawn by the statute of limitations between actions primarily based on a written contract and those based on witnesses’ memories. Indiana law maintains the classic dichotomy between contract and tort.<sup>40</sup> Currently before the Indiana Supreme Court is the issue of whether the 1975 legislature could constitutionally conclude that actions based on medical malpractice need a different, shorter statute of repose than other types of tort action.<sup>41</sup> For non-malpractice torts, the discovery rule still applies, evidently

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In cases of deception, that is active concealment, the estoppel lasts as long as the concealment; in cases of violation of fiduciary duty to disclose, that is passive concealment, termination of the physician-patient relationship terminates the duty, and the statute of limitations begins to run, without estoppel. *See Guy v. Schuldt*, 138 N.E.2d 891 (Ind. 1956); *Toth v. Lenk*, 330 N.E.2d 336 (Ind. App. 1975); *see also* discussion of concealment in DANZON, *supra* note 16, at 180. To understand better just how much delay could be excused by the concealment doctrine, it would be necessary to understand just how Indiana trial judges determine when a medical-professional relationship ends. It may be that the doctrine mainly helps plaintiffs avoid demurrer or a motion for summary judgment, getting to the jury on this and all other issues combined. We owe this last insight to Professor Lawrence P. Wilkins, of the Indiana University School of Law—Indianapolis.

38. *See supra* note 2.

39. The only conjecture as to the size of this group comes from the following sentence from *Martin v. Richey*: “the statute as it stands completely forecloses the opportunity to be heard to potentially a *very large percentage* of those plaintiffs within the class.” 674 N.E.2d at 1023 (emphasis added).

40. Certain contract actions may be brought for up to 20 years. IND. CODE § 34-1-2-2(6) (1993). Tort claims, however, must be brought within two years after the cause of action accrues. *Id.* § 34-1-2-2(1). This accrual has been interpreted to mean “when the plaintiff knew, or in the exercise of ordinary diligence, could have discovered that an injury had been sustained as a result of the tortious act of another.” *Wehling v. Citizens Nat’l Bank*, 586 N.E.2d 840, 843 (Ind. 1992).

41. The general statute of limitations for torts is two years from the date of discovery. IND. CODE § 34-1-2-2(1) (1993). The statute of limitations for medical malpractice torts, however, is

including actions arising out of medical care but brought against pharmaceutical companies or manufacturers of medical equipment or supplies.<sup>42</sup>

Unfortunately for careful weighing of the factors in the balance, arguments in Indiana have proceeded on a somewhat less broadly based basis. In support of the statute, it is argued that it was necessitated by a crisis in availability of liability insurance and hence in the delivery of medical care—and by implication that crisis-like adverse effects would return under a less stringent statute.<sup>43</sup> In opposition, it is argued that one particularly appealing set of claimants has been harmed by a statute enacted in response to a crisis which did not really exist or does not continue to exist.<sup>44</sup> Neither contention answers the policy questions about the actual magnitude of the reform's effects,<sup>45</sup> especially given that the 1975 reform appears not to have changed the two-year, occurrence-based nature of the statute of limitations as enacted by 1941 malpractice reform.<sup>46</sup>

### *B. Relevant Prior Research*

1. *The Extent of Mid-1970s Crisis Nationally and in Indiana.*—The early 1970s were a time of rapid increase in malpractice claims rates and significant

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two years from the date of occurrence. *Id.* §§ 27-12-7-1(b) (1975 version) & 34-4-19-1 (1941 version). *See also supra* note 9.

42. The Indiana statute is not phrased in terms of the types of tort or factual situations involved but rather in the class of defendant, namely “[licensed] health care provider.” *Id.* § 27-12-7-1(b).

43. *See, e.g.*, ISMA brief, *supra* note 20, at 1099. Evidence on the extent of crisis appears at *supra* note 12 and *infra* notes 47-53, 96-111 and accompanying text.

44. *See, e.g.*, Reply Brief of Appellant at 8, *Martin v. Richey*, 674 N.E.2d 1015 (Ind. Ct. App. 1997); *see also* ITLA brief, *supra* note 20.

45. Even informed speculation as to the likely practical impact of a longer statute of limitations is notably absent from the briefs of the parties and *amici*. Martin does, however, offers some quantitative evidence (on malpractice premiums, number of claims, effect of damage caps, etc.) in support of her contention that there is no longer—if there ever was—a malpractice “crisis.” Brief of Appellant at 23-27, Reply Brief of Appellant at 7-10, *Martin v. Richey*, 674 N.E.2d 1015 (Ind. Ct. App. 1997). Dr. Richey and *amici* do not offer empirical support for their side, but rather focus on the desirability of deference to legislative judgment on the issue. *E.g.*, ISMA brief, *supra* note 20. We suspect that the medical tort reformers saw themselves as the little Dutch child putting a finger in the hole in a dike. They did not much know or care how much water might be on the other side, just so long as they could keep it out of their side.

46. The statutory posture of *Martin v. Richey* is confusing. The briefs attack and defend the occurrence-based reform of 1975, along with the severity of insurance problems that prompted the reform, *see* references cited in *supra* notes 43-45. However, the 1941 reform used nearly identical language for the starting point of the statute of limitations—the “act” complained of rather than the “accrual” of a cause of action. *See supra* note 9. “Accrual” is a more common statutory term, *see supra* note 40, and has often facilitated interpreting the law to include a “discovery” exception. The ISMA brief, *supra* note 20, mentions the 1941 Act; but no brief appears to address the oddly bipartite nature of statutory support for the occurrence basis of the Indiana malpractice law.

change in the insurance industry, as already noted. Nationwide, claims rates for physicians and surgeons coverage grew slowly from 1966 through 1970, then doubled by 1973.<sup>47</sup> In Indiana, the increase in claims frequency was 42% for 1970-75.<sup>48</sup> Claims "severity," that is, average payout per claim, also rose sharply.<sup>49</sup> Rises in claims frequency and severity led malpractice insurers to seek much higher insurance premiums, 410% higher from 1970-75 in Indiana.<sup>50</sup> Premiums rose sharply all across the country, for some physician specialties more than for others.<sup>51</sup> In some states, notably including Indiana, many carriers even withdraw wholly or partly from offering coverage.<sup>52</sup> Despite the rapid rates of change in Indiana claims and premiums, there are some indications that the state was not high compared with national norms.<sup>53</sup>

In response, physicians declared a national crisis, and almost all legislatures

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47. DANZON, *supra* note 16, at 61 (Figure 4.1—national data from the Insurance Services Office).

48. U.S. GAO, MEDICAL MALPRACTICE: CASE STUDY ON INDIANA (1986) (citing without reference a report from the Indiana Medical Malpractice Commission).

49. DANZON, *supra* note 16, at 62 (Figure 4.2—noting that severity tripled from 1969-75, according to national data from the Insurance Services Office); U.S. GAO, *supra* note 48, at 8 (noting that average awards in Indiana almost tripled, from \$13,000 to \$34,000).

50. U.S. GAO, *supra* note 48, at 8.

51. One project tracked five specialties' premiums on a consistent basis, using data gathered by the Health Care Financing Administration for different purposes. During 1974-75 (the earliest available data), premiums doubled for obstetricians, nearly tripled for anesthesiologists, even after adjusting for inflation, *see* Bovbjerg, *supra* note 7, Fig. 1, at 505. Over a longer time period the largest increase was that for obstetricians, nearly 300% in 1975-86. *See* SLOAN ET AL., *supra* note 33, at 8 (Figure 1.1).

52. In Indiana, 7 of 10 insurers stopped writing new policies, canceled policies, or limited new business. U.S. GAO, *supra* note 48, at 8-9. According to a compilation from the American Medical Association, some 550 practitioners, mainly physicians, were insured by the state's joint underwriting association in 1976, the year after Indiana's malpractice reforms authorized a JUA. This means that a small share of doctors (under 7%) could not get coverage from a conventional carrier at normal premiums. *See Indiana, in STATE BY STATE REPORT ON THE PROFESSIONAL LIABILITY ISSUE* (Am. Med. Ass'n Taskforce on Prof'l Liab.), Oct. 1976 (duplicated report, not consecutively paginated) [hereinafter REPORT].

53. Indiana's relative cost of physician coverage in 1972 was only 55.6% of the national average, having declined steadily from 70.7% in 1960, according to data from the then-leading "rating bureau" for the industry, the Insurance Services Office. *See* Mark Kendall & John Haldi, *The Medical Malpractice Insurance Market, in U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, REPORT OF THE SECRETARY'S COMMISSION ON MEDICAL MALPRACTICE & APPENDIX 539* (1973) (California was highest at 252.2%, Wyoming was lowest at 29.9%). An almost identical pattern was found for surgeons and for hospital coverage. *Id.* at 540, 543. The leading carrier for Indiana, however, was Medical Protective, which may not have contributed its data to ISO nor used ISO rates. At least one smaller carrier did use ISO rates. *See* REPORT, *supra* note 52. The findings of the NAIC claims census, *supra* note 15, are discussed *infra* at notes 92-122 and accompanying text.

enacted some form of tort reform, with Indiana the first to act.<sup>54</sup> The extent of crisis was somewhat in the eye of the beholder,<sup>55</sup> but physicians fervently believed that their medical practice was at risk,<sup>56</sup> and legislatures found the concerns legitimate.<sup>57</sup> Physicians and hospitals in most states not only lobbied for tort reform but also invested effort and capital in their own insurance reform, by forming their own insurance companies in order to assure continued availability of coverage and fair premium rates.<sup>58</sup> Another private insurance reform also helped stabilize insurance—a general shift from “occurrence” to

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54. Bovbjerg, *supra* note 7, at 514-32; Glen O. Robinson, *The Medical Malpractice Crisis of the 1970s: A Retrospective*, 49 LAW & CONTEMP. PROBS. 5, 18-26 (1986). The Indiana reforms were signed into law on April 24, 1975, the first comprehensive malpractice statute in the country. U.S. GAO, *supra* note 48, at 9.

55. Compare SYLVIA LAW & STEVEN POLAN, *PAIN AND PROFIT: THE POLITICS OF MALPRACTICE* (1978) (crisis overstated, driven by insurers), with George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521 (1987) (severe crisis arising from legal developments). See also Frank A. Sloan & Randall R. Bovbjerg, *Medical Malpractice: Crises, Response and Effects*, RESEARCH BULLETIN (Health Ins. Ass'n of Am., Washington D.C.), May 1989. Because “crisis” is not objectively defined nor its existence agreed, this Article might have put every use of the term in quotation marks, but we have spared readers such typological overload.

56. The flavor of the times is captured in *A LEGISLATOR'S GUIDE TO THE MEDICAL MALPRACTICE ISSUE* (David G. Warren & Richard Merritt eds., 1976). Section two, “Case Studies from Five States,” is especially illuminating. *Id.* at 27-85 (chapters authored by state legislators, not including Indiana). Crisis concerns in California were so strong and devotion to physician insurers so persistent, that the physician insurers today continue to tout their role in ending the crisis. See, e.g., NORCAL Mutual Insurance Company, *About NORCAL* (visited June 16, 1998) <<http://www.norcalmutual.com/norcal/norcal.htm>> (self-description begins: “For many of our policyholders, the memories of practicing medicine in California in the early 1970's remain all too vivid.”).

That these perceptions influence commercial insurers’ sales was also supported by the first author’s personal interviews conducted with insurance-industry participants and observers in California during April and May 1998 for a different purpose (unpublished, confidential information).

57. See *supra* note 12 and accompanying text. Quite apart from how severe any crisis may have been, using “crisis” as the key argument justifying reform has the classic problem that it “proves too much.” That is, there appears to be no way to set any boundary on how much reform is needed. See also text following *supra* note 125.

58. See Posner, *supra* note 6, at 39-40; SLOAN ET AL., *supra* note 33, at 5. Indiana did not get a home-grown physician mutual insurer, possibly because the state already had a physician-owned company, Medical Protective, the state’s largest insurer. U.S. GAO, *supra* note 48, at 7. Medical Protective was chartered at the turn of the century. Although physician owned, it is a for-profit stock company, unlike the physician mutuals and similar entities formed in the 1970s. See The Medical Protective Company (home page, visited June 16, 1998) <<http://www.medicalprotective.com>>. Availability of coverage in Indiana was also aided by the JUA created by the state, see *supra* note 52.

“claims made” policies.<sup>59</sup>

One reason for the steep rise in claims in the early 1970s, though not the only one, was the liberalization of judicial doctrine.<sup>60</sup> Professor Danzon’s analysis found that states adopting four pro-plaintiff changes by 1970 averaged 53% higher claims frequency per capita and 26% higher severity (per insured payout) and thus 86% higher claims cost per capita.<sup>61</sup> Longer statutes of limitations were also found to raise claims rates, but not by a large amount.<sup>62</sup>

However, insurance crises appear to a great extent to be cyclical, rooted in the difficulties of predicting the future, the tendency of insurance competition to drive prices below actuarially expected losses in good times, and the reactions of insurance investors to unexpected losses.<sup>63</sup> Legal developments can certainly precipitate or exacerbate problems, as the unanticipated run-up of claims did in the early 1970s. And tort reform (not just of the statute of limitations) probably helped to moderate insurance swings, as well as to reduce reform states’ insurance premiums relative to others.<sup>64</sup> It is notable that insurance claims dipped in the late 1970s after almost all states enacted some malpractice reform and dipped again in the late 1980s, after most states enacted more tort reforms, often general ones applicable to all torts or all personal injuries. However, the crises ebbed nationwide in the late 1970s and 1980s, both in states with strong tort reform and in those with only weak legislation. And the enactment of strong 1970s reform did not prevent the occurrence of 1980s claims rises, in Indiana or elsewhere.<sup>65</sup> Claims are on the rise again in the 1990s,<sup>66</sup> even though tort reforms

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59. See *supra* note 36 and accompanying text.

60. Many other social and medical reasons are sometimes cited, but are seldom able to be tied directly to observed claims trends. See generally, Robinson, *supra* note 54, at 11-18, and sources cited therein (noting “intuitive” nature of most assessments, *id.* at 18). The pioneering work of Professor Danzon is an exception. See *supra* notes 34-35, 61-62 and accompanying text.

61. DANZON, *supra* note 16, at 76-77. The doctrines were abolition of the locality rule and of charitable immunity, expansion of informed consent and of *respondeat superior*, as tabulated by Stephen C. Dietz et al., *The Medical Malpractice Legal System*, in 2 MEDICAL MALPRACTICE: REPORT OF THE SECRETARY’S COMMISSION ON MEDICAL MALPRACTICE, APPENDIX (1973).

62. DANZON, *supra* note 16, at 78. However, this analysis evidently did not account for non-statutory discovery rules that extend the basic statute of limitations. *Id.* at 245 n.25.

63. See generally SLOAN ET AL., *supra* note 33; Ralph A. Winter, *The Liability Crisis and the Dynamics of Competitive Insurance Markets*, 5 YALE J. ON REG. 455 (1988).

64. Indiana started low in premiums and stayed low. California’s premium history is more remarkable; it enacted even more comprehensive reform than did Indiana, though with slightly less stringent individual provisions (longer statute of limitations and cap on only the non-pecuniary element of awards). In the wake of its reforms, California has gone from the highest-premium state, *see* Kendall & Haldi, *supra* note 53, to the low middle range, *see* Stephen A. Norton, *The Medical Malpractice Premium Costs of Obstetrics*, 34 INQUIRY 62 (full data in underlying Working Paper 06559-01, Urban Institute, Washington, DC, June 1996).

65. See generally U.S. GAO, *supra* note 48; Bovbjerg, *supra* note 7.

66. See, e.g., Health Care Liability Alliance, *Health Care Lawsuits, Claim Payments on Upswing* (visited June 16, 1998) <<http://www.wp.com/hcla/hcla426.htm>>.

have continued to be enacted, and few have been repealed or invalidated. More potent causes and factors are likely at work here, including social attitudes about medicine and about litigation.<sup>67</sup> Other ameliorative factors also helped in the late 1970s, notably the entry of new insurers run by medical providers and the change to claims-made coverage.<sup>68</sup>

*2. One Legislative Response to Crisis: The Balance Struck in Other States' Reforms of Statute of Limitations.*—The specific element of Indiana tort reform under attack in *Martin v. Richey* is Indiana's statute of limitations for medical malpractice cases. The two-year basic statute of limitations on both tort and malpractice filings is not challenged. This is understandable, even though a two-year cut-off almost certainly denies access to the courts for some potential claimants<sup>69</sup>—for two years is the national norm. Presumably this arbitrary time limit reflects widely shared qualitative perceptions about the ready discoverability of personal injury in the usual case and the desirability of forcing plaintiffs and their attorneys not to drag their feet before bringing suit. Indiana is also typical in allowing children more time to sue. Where it differs is in the stringency of its denial of extra time for discovery of latent injuries to adults.

Indiana was one of a majority of states that legislated changes in their statutes of limitation either in the mid-1970s round of tort reform, or in the similar changes of the mid-1980s.<sup>70</sup> Frequently these changes applied only to malpractice cases, which ironically had sometimes previously had special enactments to lengthen the basic statute.<sup>71</sup> Most commonly enacted were "statutes of repose" that set outer limits on the length of time that reasonable non-discovery of a cause of action could toll the basic statute of limitations. These ranged from three to ten years, sometimes allowing an exception for foreign substances left in a patient or fraudulent concealment by potential defendants.<sup>72</sup> Indiana appears to be one of only a few states to reject any evolution of the discovery rule entirely by legislative action.<sup>73</sup> A number of states, like Indiana, enacted special statutes for children—setting the bar lower

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67. A plausible argument can be made, however, that the publicity and lobbying that promoted tort reform in the 1970s and 1980s probably also affected social attitudes. We have not reviewed any evidence from public opinion polls.

68. *See supra* notes 58-59 and accompanying text.

69. Changes in the length of the statute of limitations have been found to reduce claims frequency. *See supra* note 62 and accompanying text.

70. Bovbjerg, *supra* note 7, at 524, 542 (Table 3).

71. *Id.* at 524 n.111.

72. *See* Robinson, *supra* note 54, at 22.

73. *Id.* at 21 n.88. Robinson cites Delaware, New Mexico, and South Dakota along with Indiana as having moved to occurrence-based statutes, but his description of Delaware enactment suggests that it incorporates a discovery rule of into the statute. South Dakota was more stringent than Indiana, allowing only two years, without exception for minors. New Mexico, like Indiana, makes an exception to the basic statute for children under six, but is less stringent in allowing three years from injury rather than two. Indiana appears to have pre-empted any evolution of a discover rule through its 1941 statute. *See supra* notes 9, 46.

than the traditional age of majority but higher than would result from applying the basic statute of limitations.<sup>74</sup> These appear to subsume the discovery rule; the minority statutes give newborns the longest time for discovery, the least to children nearing the maximum age less the basic statutory period—age six, in Indiana's case (age eight less two years).

3. *Differences between Medical and Other Forms of Liability.*—Given Indiana's decision to set different rules for medical liability than for other torts, one may ask how different medical liability is from other torts. Reliable, objective information is scarce with regard to medical liability even standing alone, as argued above.<sup>75</sup> Information that compares medical with other forms of liability is even rarer, but it is possible to note several documented differences.

One salient difference between medical professional liability and other liability is the extent of the “long tail” of claims brought long after “occurrence-policy” premiums were set and collected to pay for them. This difference is the most relevant to reform of statutes of limitation. States like Indiana enacted reforms and insurers adopted “claims made” policy forms in an attempt to shorten this tail.<sup>76</sup> The tail is the far right end of the distribution of claims reporting and disposition times. For medical malpractice, it extends very far out into the future. Malpractice cases are slow to be reported to insurers and also to be resolved once reported, as is considered in more detail below.<sup>77</sup>

How different is this pattern from other coverages, however? One comparison tracked cumulative insurance payouts over time in officially reported insurance data from different lines of coverage, which has the advantage of being tabulated on a consistent basis across lines. Compared with auto personal injury, workers compensation, and other liability coverage, malpractice insurance took a full year longer to reach the median dollar payout of a ten-year total than auto, the most common type of personal injury claim.<sup>78</sup>

Another difference, according to conventional wisdom among insurers, is that malpractice is a “low frequency-high severity” line. Claims are brought relatively infrequently, but when claims are made, average payments per paid claim are high.<sup>79</sup> In contrast, automobile liability features relatively high claims frequency but low severity.<sup>80</sup> This medical liability claims pattern makes medical liability rates more volatile in responding to shifts in claimants’ propensity to sue or in the generosity of legal payment rules or juries’ application of them.

Finally, there is some evidence that juries make higher awards in malpractice cases than in auto and other cases of similar observed severity of injury.<sup>81</sup> Some

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74. See, e.g., COLO. REV. STAT. ANN. §13-80-102.5(d)(I) (West 1997); Robinson, *supra* note 54, at 22 n.91.

75. See *supra* notes 10-11 and accompanying text.

76. See *supra* notes 8-9, 36 and accompanying text.

77. See *infra* notes 102-07 and accompanying text.

78. SLOAN ET AL., *supra* note 33.

79. *Id.* at 24.

80. *Id.*

81. See Randall R. Bovbjerg et al., *Juries and Justice: Are Malpractice and Other Personal*

of this difference may be attributable to inherent differences among types of tort, some to the effect of defendants with "deep pockets," and some to the selection of cases for trial by attorneys. Attorneys may proceed disproportionately with more severe cases because malpractice claims also seem to be more difficult, time consuming, and costly for attorneys than are otherwise similar personal injury cases.<sup>82</sup> This difference in awards seems least relevant to the statute of limitations, which does not target award size.

It is notable that in the 1970s, state legislatures enacted tort reforms that were almost exclusively specific to medical malpractice, like those in Indiana, whereas in the 1980s, general tort reforms were more prominent.<sup>83</sup> This suggests that legislatures were more driven by the nature and extent of immediate insurance-market problems than by any inherent differences between different forms of tort liability.

4. *The Impact of Reformed Statutes of Limitations.*—A number of studies have examined the extent to which reductions in statutes of limitation reduce malpractice claims rates or premiums,<sup>84</sup> which is what they were intended to do. The most carefully done are those by Patricia M. Danzon and by Frank A. Sloan and colleagues, which examine effects of tort reforms by state and over time, holding other influences constant through multivariate statistical analysis.<sup>85</sup> Neither found any effect of statutes of limitations reforms when examining data from the 1970s,<sup>86</sup> but both found effects when looking at a longer time period.

Danzon found that over 1975-84, the average effect of a one-year reduction in the statute of limitations was a cut in claims frequency of 6% to 7%.<sup>87</sup> Sloan and colleagues found for 1975-86 premiums that cutting a basic statute of limitations by one year can be expected to cut premiums in the long-run by over 10%; shortening the discovery period has about half as much impact.<sup>88</sup>

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*Injuries Created Equal?*, 54, LAW & CONTEMP. PROBS. 5 (1991).

82. *Id.* at 16-17. An early 1970s large national survey of plaintiff and defense lawyers also found almost unanimous agreement that malpractice claims are more time consuming, about four times more time, according to respondents. *See* Dietz et al., *supra* note 61, at 101.

83. *See* Bovbjerg, *supra* note 7.

84. *See, e.g.*, OFFICE OF TECHNOLOGY ASSESSMENT, EFFECT OF LEGAL REFORMS ON MEDICAL MALPRACTICE COSTS 67 (1993) (summarizing available studies, including those cited at *infra* note 85).

85. DANZON, *supra* note 16; Patricia M. Danzon, *The Frequency and Severity of Medical Malpractice Claims: New Evidence*, 49 LAW & CONTEMP. PROBS. 57 (1986); Frank A. Sloan, *State Responses to the Medical Malpractice Insurance "Crisis" of the 1970s: An Empirical Assessment*, 9 J. HEALTH POL. POL'Y & L. 629 (1985); Frank A. Sloan et. al., *Effects of Tort Reforms on the Value of Closed Medical Malpractice Claims: A Microanalysis*, 14 J. HEALTH POL. POL'Y & L. 663 (1989); Stephen Zuckerman et al., *Effects of Tort Reforms and Other Factors on Medical Malpractice Insurance Premiums*, 27 INQUIRY 107 (1990).

86. DANZON, *supra* note 16, at 78; Sloan, *supra* note 85, at 643.

87. Danzon, *supra* note 85, at 71-72. The effect is measured at the mean of pre-reform statutes, about five years, scoring an unlimited discovery rule as 10 years.

88. Zuckerman et al., *supra* note 85, at 175. The companion analysis of frequency produced

Of particular interest for the statute of limitations was an analysis comparing individual claims closed in different states before and after tort reforms, which could examine detailed characteristics of individual cases.<sup>89</sup> It found that reducing the basic statute of limitations by a year lowered the average time to filing by one third of a month, with no effect on size of payment.<sup>90</sup> Allowing a long discovery period, however, was found to increase the probability that filed claims would be paid; states with an unlimited period of discovery had a 15% higher rate of paying claims than states with a two-year maximum (paralleling the statute of limitations in Indiana for adults).<sup>91</sup>

All such statistical studies examine the aggregate impact that reforms by estimating the average impact of similar reforms across states. They have little to say about how the reforms achieve the effect that they do or what types of cases are affected by reform.

### C. "New" Evidence from the NAIC Closed-Claims Census of 1975-78

There exists a unique data source for considering the environment in which the 1975 Indiana reforms were legislated, as well as the potential impact of maintaining a two-year, occurrence-based statute of limitations for adults. Fortunately for this Article, these data are accordingly not "stale" but rather appropriately contemporaneous to the twenty-three-year-old statute now under attack.

In July 1975, the National Association of Insurance Commissioners began its landmark collection of data from virtually every medical malpractice claim closed in the entire country from then through 1978.<sup>92</sup> The resulting compilation of insurance information illustrates the nature of malpractice claims arising almost wholly during the period before reform, as claims take some time to be filed and resolved. During the three and one-half years of the study, the NAIC compiled information on 62,097 incidents of potential injury from medical malpractice, leading to 71,782 claims.<sup>93</sup> This information was not published until September 1980, although a first-year report was issued in December 1975.<sup>94</sup> Such broad-based and independently compiled information was not available to

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anomalous results. *Id.* at 178-80.

89. Sloan et al., *supra* note 85.

90. *Id.* at 674. The basic statutory time period was set at the adult or minor level, depending on the age of each case's claimant.

91. *Id.* at 675, 677. Unlimited discovery was coded as 10 years, following Danzon's convention.

92. NAIC, *supra* note 15. The commissioners' mandate to submit data applied to all 128 medical malpractice insurers writing over one million dollars in premiums in any year since 1970. *Id.* at 4. The NAIC book includes data from all claims files closed between July 1975 and December 1978, that is, a period of 3 1/2 years.

93. *Id.* at 13, 36.

94. 1 NATIONAL ASSOCIATION OF INSURANCE COMMISSIONERS, MALPRACTICE CLAIMS (1975).

the Indiana legislature in considering its malpractice provisions. The following information comes from the published record of that census.<sup>95</sup>

1. *The Indiana Claims Rate.*—How big a problem did Indiana face in 1975, according to this contemporary claims record? Indiana ranked one fifth above the national average in rate of closed claims per physician, according to NAIC calculations,<sup>96</sup> even without correcting for some apparent under-reporting by insurers in Indiana.<sup>97</sup> The state did not rank above national norms in incidents per population<sup>98</sup> or per hospital bed, however.<sup>99</sup> This higher ranking in claims per physician than per population presumably reflects the state's low physician-population ratio, given the relatively low litigiousness of Indiana's population.<sup>100</sup> Indiana ranked below the national average in average indemnity paid.<sup>101</sup>

2. *Indiana's Average Speed of Filing.*—Legislating a short, occurrence-based statute of limitations is meant to reduce the "age" of claims being filed relative to allowing later-discovered injuries to be litigated. It is thus appropriate to ask how Indiana's speed of filing ranked relative to other states. Table 1 shows that Indiana closed claims were very similar to those of the nation as a whole in average time from incident to insurance claims report. The average speed of discovery was 17 months in Indiana, versus 16 months in the United States as a whole (slightly longer for cases ultimately paid). It is quite surprising that Indiana's speed of reporting is so close to that of the nation as a whole, for most states by this time applied a discovery rule, but not Indiana.<sup>102</sup>

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95. Resources for the preparation of this Article were not sufficient to allow use of the automated, primary data tape whose information underlies the NAIC publication. NAIC, *supra* note 15. This Article is accordingly based solely upon the publication, a secondary source of already-tabulated information.

96. NAIC, *supra* note 15, at 124 (Table 3.3). The national average was 3.83 claims per 100,000 active physicians as reported by the American Medical Association. *Id.* at 116. Indiana's rate of 4.65 was thus comfortably higher than average, though slightly lower than neighboring Michigan's 4.90 rate and well below the level of "crisis" leader California (6.81). *Id.* at 124. Indiana was also somewhat above average in paid claims and in large paid claims (over \$100,000) per physician. *Id.*

97. The NAIC found that three companies seemed to have under-reported claims during portions of the study. States affected included Indiana. *See* NAIC, *supra* note 15, at 116.

98. NAIC, *supra* note 15, at 121 (Table 3.2).

99. NAIC, *supra* note 15, at 127 (Table 3.4).

100. In 1975, Indiana's physician-population ratio was one third below the national average. *See* Randall R. Bovbjerg, *Lessons for Tort Reform from Indiana*, 16 J. HEALTH POL. POL'Y & L. 465, 483 (1991) (appendix Table 1).

101. NAIC, *supra* note 15, at 124 (Table 3.3: \$20,158 vs. \$25,161).

102. In the pre-reform era, 24 states applied a discovery rule, according to Comment, *Malpractice Statute of Limitations in New York: Conflict and Confusion*, 1 HOFSTRA L. REV. 276, 292 n.73 (1973). Indiana applied only its broad doctrine of fraudulent concealment, *see supra* note 9, which uses discoverability only to end the constructive fraud of physicians' failure to disclose material information to their injured patients. *See, e.g.*, *Toth v. Lenk*, 330 N.E.2d 336 (Ind. App. 1975). According to the review of state law done for Dietz et al., *supra* note 61, Table III-62, at

**Table 1**  
**Speed of Discovery, Indiana vs. National\***  
**Incidents from claims closed July 1975 - December 1978**

	average times elapsed from incident to reporting**						percentages	
	total cases		paid cases		unpaid cases		share of cases paid, by area	share of total cases, by age
	average months	number of cases	average months	number of cases	average months	number of cases		
<b>all ages</b>								
Indiana	17	1,281	19	596	16	685	46.5%	100.0%
U.S. total	16	61,390	17	25,406	16	35,984	41.4%	100.0%
<b>minors</b>								
Indiana	26	184	34	96	17	88	52.2%	14.4%
U.S. total	23	7,660	25	3,449	21	4,211	45.0%	12.5%
<b>adults</b>								
Indiana	16	1,097	16	500	16	597	45.6%	85.6%
U.S. total	16	53,730	16	21,957	16	31,773	40.9%	87.5%

source: NAIC, *supra* note 15, Table 3.1, at 115

notes: \* Indiana reporting of data was slightly less comprehensive than national;  
reference presents minors and all ages, paid and unpaid -- other values are calculated

All of the difference between Indiana and national speed derived from the difference in delays for minors, 26 months for Indiana, versus 23 nationally.<sup>103</sup> Delay for children came mainly from paid cases, which took twice as long as unpaid to be discovered in Indiana, compared to only a small difference in the United States. For adults, times to report were identical in Indiana and the United States, both for paid and unpaid cases. Indiana was also similar to the United States in the share of cases involving minors versus adults, 14.4% and 85.6% for Indiana, and 12.5% and 87.5% for the United States. Indiana cases were more likely to be paid at resolution than were U.S. cases, with a larger difference for children than for adults. (All data from Table 1)

These insurance data present time to claims report, not to litigation, whereas the statute of limitations sets the maximum time to filing of a lawsuit. This discrepancy does not affect the comparisons drawn, however. For one thing, the average time to lawsuit would be somewhat longer but perhaps not much, as malpractice insurers very often get notice of an incident only when they hear from a claimant's lawyer, near the time of litigation. Moreover, the Indiana and national times are tabulated on the same basis, so these comparisons remain valid.

The NAIC noted that the time to reporting was increasing during their study, though their publication does not present average report times by year. For cases

134, 36 states including the District of Columbia liberalized their statutes of limitations with one or the other of these two doctrines.

103. Where more than one claim arose from one incident, the earliest report was taken as the time of claim, the last payment or other closure as the time of disposition. Minors were claimants under 18 years old at the time of incident. See NAIC, *supra* note 15, at 22.

closed during 1975, 81% of all cases had been reported within two years; for 1978, the figure was 74%.<sup>104</sup>

3. *The Extent of the "Long Tail" for Discovery.*—How many claims, of what types, were potentially affected by the Indiana reform of the statute of limitations? The NAIC data provide some indications. Consider first Table 2.

**Table 2**  
**Speed of Discovery for Minors and Adults (national data)**

**Time elapsed from incident to report in claims closed July 1975-December 1978**

time in years	age at time of report					
	minors		adults		all ages	
	number of cases	percentage of cases	number of cases	percentage of cases	number of cases	percentage of cases
0-2	5,513	71.7%	41,876	77.6%	47,389	76.9%
2-4	1,353	17.6%	9,924	18.4%	11,277	18.3%
4-6	323	4.2%	1,094	2.0%	1,417	2.3%
6-8	154	2.0%	339	0.6%	493	0.8%
8-10	85	1.1%	100	0.2%	185	0.3%
10-20	146	1.9%	162	0.3%	308	0.5%
20+	115	1.5%	439	0.8%	555	0.9%
total	7,689	100.0%	53,935	100.0%	61,624	100.0%

**Dollars of indemnity and percentages by time from incident to reporting**

years	millions of dollars		percentage of dollars		millions of dollars		percentage of dollars	
	millions of dollars	percentage of dollars	millions of dollars	percentage of dollars	millions of dollars	percentage of dollars	millions of dollars	percentage of dollars
0-2	\$115.1	54.8%	\$497.9	75.4%	\$613.0	70.4%		
2-4	\$55.9	26.6%	\$137.4	20.8%	\$193.3	22.2%		
4-6	\$16.6	7.9%	\$14.8	2.2%	\$31.3	3.6%		
6-8	\$8.6	4.1%	\$3.6	0.5%	\$12.2	1.4%		
8-10	\$2.5	1.2%	\$1.8	0.3%	\$4.4	0.5%		
10-20	\$7.4	3.5%	\$1.4	0.2%	\$8.7	1.0%		
20+	\$4.0	1.9%	\$3.8	0.6%	\$7.8	0.9%		
total	\$210.1	100.0%	\$660.6	100.0%	\$870.7	100.0%		

source: NAIC, *supra* note 15, Table 1.1, at 24

notes: data represent all reported cases, paid (slightly slower to be reported) and unpaid (slower); multiple claims from one incident are consolidated; dollars are nominal; table omits <1% of cases that lack relevant date(s); minors were <18 at incident

It shows speed of discovery as a distribution of closed claims by time elapsed between incident and report:<sup>105</sup> For minors, 71.7% of closed claims had been reported within two years, compared to 77.6% for adults. Large paid claims had taken longer to be reported; after two years, reporting reflected only 54.8% of the

104. *Id.* at 22.

105. The data provide a tabular illustration of the "long tail" of the malpractice claims distribution. Half of cases closed (51.5%) were filed within a year of incident. It took over 20 years for all of the other half to be reported. *Id.* at 24 (Table 1.1).

eventual payments for minors, 75.4% for adults.<sup>106</sup> For minors, 95.5% of cases had been reported within eight years of incident, involving 93.4% of the dollars ultimately paid. For adults, 98.7% of cases had been reported within eight years of incident, involving 98.9% of the dollars ultimately paid. These data are national; state-specific distributions were not given. For adults, Indiana's long-tail pattern may well be similar to the national one, based on the similarity of the average; for minors, more than the national 4.5% of cases would remain unreported after eight years, given the state's higher average delay.<sup>107</sup>

These figures may indicate the general order of magnitude of cases potentially affected by a rigidly applied occurrence-based statute of limitations like Indiana's two or eight-year statute—5% or more of the total. Just how much more cannot be directly estimated, however. As already noted, it is not known how close together insurance and lawsuit filings are. Moreover, two additional, countervailing phenomena must be noted. First, closed-claims data *underestimate* the speed of discovery and the number of cases in the "long tail" during a period when the claims rate is rising, as it was in the 1970s. Second, pre-reform data *overestimate* the extent of cases foreclosed because the behavior of claimants and their attorneys can be expected to change in response to the reform: To the extent that they can accelerate filings, they will. That is, the reforms will make some number of claimants and their attorneys simply move faster with their discovery and decision making so as to file their claim within the new statutory period.

The second bias is easy to understand, but the first takes some explanation. The problem is that a statutory reform affects all cases going *forward* from its effective date. In contrast, the NAIC study looked *backward* from a limited period of closures to much earlier times of incident and report (more than twenty years earlier, as shown by the longest time period of Table 2).<sup>108</sup> The "long tail" observed in the NAIC data is that of incidents occurring many years before. As observed from the vantage point of 1975-78 closures, information on twenty year old cases comes from incidents of 1955-58. In contrast, information on one year old cases comes from 1974-77, on two year old cases from 1973-76, and so on. If the rate of claims were constant, this would not matter, as a closed-claims study contains information on the complete time distribution of cases—those closed in every year after incident, first, second, third, and so on—even though the incident year differs for each "vintage" of case closed.

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106. It is not clear why paid claims take longer to be reported. It may be that a larger share of them are found by claimants and brought by a lawyer, whose investigation would add time, whereas unpaid cases may come disproportionately from reports by insured physicians or hospital staff, who may more quickly appreciate the nature of an event.

107. *See supra* note 103 and accompanying text. The figure would also be higher because the minors' limitation is based on claimants' age, not the injury "age" shown in the tables. A maximum of eight years could elapse in the case of a newborn injured at birth, entitled to sue any time until age eight. A child injured the day before her sixth birthday, however, would have an effective time of two years and a day, also until her eighth birthday.

108. The oldest case evidently arose 25 years before closure. NAIC, *supra* note 15, at 14.

However, the claims rate was not constant but rose dramatically over the twenty plus years.<sup>109</sup> So the NAIC calculation of average times is biased downward (though the comparison of Indiana versus United States times still holds). Claims arising in 1955 and closed in 1975 could have been reported within one year, two years, any length of time up to twenty years. The larger number of claims arising in 1975 could only have been reported within one year. Mixing these all together on an unadjusted basis makes the overall "population" average of Table 1 too short, and similarly for the distribution of Table 2.

How big is the bias? NAIC actuaries re-estimated the claims distribution as though closures had been observed for a population of claims all occurring in a current incident year.<sup>110</sup> Table 3 compares those re-estimates by incident year to the closed-claims data underlying Tables 1 and 2. Five years from incident, the closed claims data show 8.5% of paid cases unresolved, versus 29% on an incident-year basis.<sup>111</sup> So the downward bias of closed-claim tabulation may be quite large.

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109. NAIC estimated an annual increase in the rate of claims of 5% starting from 1970. *Id.* at 106. Other sources showed larger rates of increase.

110. *Id.* at 82-83.

111. It is not possible to correct Tables 1 or 2 directly because the NAIC publication does not present sufficient information to do so. The cases estimated are paid claims and total dollar payouts (which are most important for premium rate making) only, not including unpaid claims. Moreover, the corrected times presented are to closure (not to report). Further, the times are calculated from the beginning of the incident year rather than from precise date of incident. Finally, the revised distribution used less differentiated time intervals than those used for the "raw" data. Therefore, the times in Table 3 do not match those of Table 2.

**Table 3**  
**Claims Resolution by Year of Closing vs. Year of Incident**

time from start of incident year	proportion of claims paid			
	in closed claims data		estimated for incident year	
	by count	by dollars	by count	by dollars
3 years	65.8%	44.3%	43%	6%
5 years	91.5%	82.9%	71%	18%
10 years	99.2%	99.2%	91%	56%
15 years	99.4%	99.6%	96%	79%
20 years	99.4%	99.6%	99%	95%
20+ years	100.0%	100.0%	100%	100%

Source: data on disposition from incident from NAIC, *supra* note 15, Table 1.3, at 29 (estimated as of start of incident year by adding six months, average for 12 months of claims each year); incident-year projections from *id.* at 83. See also discussion of claims development, *id.* at 105-09

Notes: Closed claims data report actually observed closures during 3.5 year period; cases arose from many different incident years; pattern by "occurrence" or incident year is actuarially estimated

4. *Characteristics of Slow-filed Cases.*—Just what types of cases are the slow-filed incidents at risk of being foreclosed by a shorter statute of limitations? The slower claims "development" of cases involving minors has already been noted (Table 1).<sup>112</sup> It may be due to minors' early stage of physical and mental development, or to variability in expectations for development, which may mask the occurrence of an injury readily noted in a fully developed adult accustomed to a certain level of functioning. And, of course, adults can more readily communicate problems they perceive than can infants or children.

The next most salient single attribute is severity of injury. More serious injuries are slower to be reported (Table 4). The overall average time to report is sixteen months (Tables 1 & 4), for temporary injuries two months less, for permanent ones other than death eight months more (Table 4).

112. See *supra* notes 102-03 and accompanying text. It is not known from the published data how patterns differ for 0-6-year-olds (least affected by the new limitation) and those 6-21 (most affected).

**Table 4**  
**Severity of Injury and Speed of Resolution**  
**(U.S. Total, in closed claims 1975-78\*)**

no.	severity of injury category, description	time from incident to report to disposition (average months elapsed)						
		total incidents		paid incidents			unpaid incidents	
		incident to report	report to close	incident to report	report to close	average \$000's**	incident to report	report to close
1	emotional only, no physical damage	15.1	15.5	16.0	19.3	\$4.7	14.9	14.5
	temporary	14.0	18.4	14.4	21.3	\$9.4	13.7	16.4
2	insignificant, e.g., laceration, no delay in recovery	11.6	13.8	11.9	15.3	\$2.6	11.4	13.0
3	minor, e.g., misset fracture, recovery delayed	13.6	18.3	13.8	21.2	\$7.1	13.4	16.5
4	major, e.g., surgical material left, recovery delayed	16.8	22.0	16.7	24.5	\$16.8	17.0	19.4
	permanent	23.9	26.8	23.6	30.9	\$75.6	24.2	22.6
5	minor, e.g., loss of fingers, includes non-disabling injuries	20.6	25.4	20.0	28.8	\$27.6	21.3	21.9
6	significant, e.g., loss of eye, kidney, or lung	23.2	28.1	23.5	32.0	\$72.9	22.8	23.8
7	major, e.g., blindness, brain damage	39.5	29.5	38.9	36.9	\$178.2	40.0	22.8
8	grave, e.g., quadriplegia, lifelong care or fatal prognosis	29.6	30.3	30.9	35.5	\$292.8	28.0	24.4
9	death	14.2	25.2	15.0	32.4	\$56.7	13.6	19.8
	total***	16.2	21.0	17.0	25.5	\$34.1	15.7	17.8

Source: data on disposition from NAIC, *supra* note 15, Table 1.3, at 28, on indemnity *id.*, Table 2.7, at 53; severity definitions *id.*, Table 5.6, at 304.

Notes: \* Disposition includes claim payment, settlement or other resolution; \*\* dollar values are nominal; \*\*\* total includes cases of no injury, of legal issues only, and of unspecified severity, which are excluded from severity categories, < 2% of total

This is counterintuitive, as most serious injuries should be more readily recognizable (with the exception of delayed diagnosis of a serious condition). A plausible hypothesis is that more serious cases are more likely to be taken to attorneys for investigation, which adds delay before reporting by claimants or their representative. Data on source of claims report are not given. Delay in resolution after report is also longer for more serious cases, which is more understandable, as disputation is apt to be more protracted when more is at stake. Paid cases take somewhat longer than unpaid to be reported, much longer to be resolved.

The time to report is also longer for larger paid cases. Full data are not presented, but it is noted that the average time to report is 33 months when weighted by dollars paid, versus 25 months simple average (all paid incidents equally weighted, as in Tables 1-5).<sup>113</sup>

Common sense as well as commentary on statutes of limitation also suggest that reporting/discovery delay should also be common in cases of foreign bodies left at an operative site and of delay in diagnosis. The NAIC publication does not present times to report or disposition by type of injury. The data do indicate that 1,844 cases involved foreign bodies (3% of total incidents).<sup>114</sup> Proof of substandard care and causation of injury are presumably simpler for these cases, and indeed 1,028 were paid, a rate of 56%, compared with 41% for all cases (Table 1). Payment amounts were low, however, averaging \$18,157 (well under the \$34,091 average indemnity for all cases).<sup>115</sup> As for delay in diagnosis, there were 7714 cases (12% of the total), of which 3265 were paid (a win rate of 42%,

113. NAIC, *supra* note 15, at 22.

114. *Id.* at 179-80.

115. *Id.* at 185.

which is quite average), with an average indemnity of \$44,180 (one-third higher than for all cases).

There are indications that both categories have continued to be important nationally, even after tort reform.<sup>116</sup> In the 1990s, failure to diagnose has become the leading allegation in physician malpractice claims nationally. It would be interesting to compare today's Indiana experience, with no discovery exception for the statute of limitations, with the nation's, where discovery rules typically apply. This could be done with consistently compiled, proprietary claims data—or with public information on litigation, if states maintained such data files.

5. *Another Long Tail: Time from Report to Disposition.*—Another part of the long tail of malpractice claims is the delay from report to resolution, which is actually longer than that from incident to report. This post-report delay is 21 months on average for all cases, 25 months for paid cases (Table 5, national data)—compared with 16 and 17 months delay to report (Table 1 above).<sup>117</sup>

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116. The information most comparable to NAIC data comes from a GAO survey of claims closed countrywide in 1984. There, retained foreign bodies accounted for an estimated 1,051 claims, delayed diagnosis for 12,289—between them about 17% of an estimated total of 73,472 closed claims nationwide. *See* U.S. GAO, *supra* note 27, at 78 (Tables V.1 and V.2). These estimates are very similar to the combined 15% in the NAIC data, though the GAO estimates were made by claim, the NAIC census by incident.

117. A report on a smaller study of claims closed during July-October 1976 also noted this phenomenon. *See* HEALTH CARE FIN. ADMIN., U.S. DEP'T HEALTH, EDUC. & WELFARE, MEDICAL MALPRACTICE CLAIMS: SYNOPSIS OF THE HEW/INDUSTRY STUDY OF THE MEDICAL MALPRACTICE INSURANCE CLAIMS 61 (J. Cooper ed. 1978).

**Table 5**  
**Speed of Resolution (national data)**  
**Time from report to disposition in claims closed 1975-78**

time elapsed years	all reported cases		paid cases
	percentage of cases	percentage of cases	percentage of dollars
0-2	66.7%	54.7%	32.0%
2-4	24.2%	32.8%	43.7%
4-6	6.6%	9.4%	18.1%
6-8	1.2%	1.8%	4.2%
8-10	0.4%	0.5%	1.2%
10-20	0.1%	0.2%	0.4%
20+	0.8%	0.6%	0.4%
total	100.0%	100.0%	100.0%
average (months)	21	25	—

source: NAIC, *supra* note 15, Table 1.2, at 27

notes: see notes following table 4

Two years after report, one-third of cases remain unresolved, including 45% of dollars ultimately paid (Table 5). It is not possible to disentangle just what fraction of this delay is attributable to time spent in litigation. To begin with, the report date to the insurer is not the same as the date of filing of litigation, as already noted, although it is probably close for the claims that go to litigation. It is clear that dispositions by court action take longer to achieve than those by voluntary settlement or simple non-prosecution or abandonment of a claim.<sup>118</sup>

Note that the time to disposition is also longer for larger paid cases, as for the time to report. At each time period of Table 5, a lower percentage of the dollars is resolved than of cases.<sup>119</sup> More severe cases also take much longer than average to resolve, just as they took longer to report (Table 4).

Death cases are an interesting category in terms of times to report and to disposition. They are reported relatively fast, somewhat sooner than the average for all cases and substantially faster than for other serious injuries, for paid cases 15 months, versus 17 and 24 months (Table 4). This pattern is consistent with injury's being more recognizable for serious than for lesser injuries, where new harm is less clearly distinguishable from problems associated with the normal course of the underlying disease or condition under medical treatment. However,

118. NAIC, *supra* note 15, at 73. Among paid claims, court dispositions take an average of 25 months to achieve, settlements only 18 months. These figures are faster than the disposition time shown for paid cases in Table 5, evidently because the latter is tabulated on an incident basis, and for incidents disposition is the time to resolution of the last claim involved, whereas the former reports on each claim by itself.

119. Full data on speed of resolution by size of case are not presented. The average time from report to disposition is 36 months when weighted by dollars paid, versus 25 months simple average (all paid incidents equally weighted). NAIC, *supra* note 15, at 25.

death cases, once reported, take extra long to resolve, fully thirty-two months for paid cases—or seven months longer than average. This is consistent with having difficult disputes over damages under special legal rules associated with wrongful death and survivorship cases. Disputes over causation and negligence are probably less difficult for death cases than for lesser injuries, as there is evidence from other sources that medical reviewers are more apt to find causation and negligence for more severe injuries.<sup>120</sup>

Finally, cases that are complex in terms of the number of defendants involved also experience substantial delays in resolution. Cases with only one defendant take only about two years to resolve from incident to resolution (25 months for unpaid cases, 32 months for paid). Cases with five or more defendants take about twice as long (50 or 51 months for unpaid cases, 56 to 58 for paid).<sup>121</sup>

Another national closed claims study done in the mid-1980s, after numerous 1970s reforms had taken effect, also found that claims take longer to resolve than to report.<sup>122</sup> This was so, even though most state reforms of statutes of limitations left in place a relatively long discovery allowance, unlike Indiana.

## CONCLUSION

The Indiana legislature has twice enacted a short, two-year, occurrence-based basic statute of limitations for medical malpractice, implicitly rejecting a longer, discovery-based regime. In 1941 the legislature acted to clarify that medical liability sounds in tort rather than contract. In 1975, given acute problems in the markets for liability insurance, the legislature acted to shorten the tolling-to-majority period for minors just created by Indiana Supreme Court decision in 1974.<sup>123</sup> The constitutionality of denying tort recourse to claimants with late-discovered cases is now being reconsidered by the Court. In essence, the key arguments in favor of conserving a strict approach are that the law is well settled, that crisis required a stricter rule, and that allowing stale claims would harm the administration of justice. The arguments for liberalization are that there is and was no crisis or at least none sufficient to justify a rule that wreaks substantial harm upon claimants.

This Article's review of the historical and empirical record found that Indiana faced similar mid-1970s problems to other states, which were used to

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120. See, e.g., Robert A. Caplan et al., *Effect of Outcome on Physician Judgments of Appropriateness of Care*, 265 JAMA 1957 (1991); Steven A. Schroeder & Andrea I. Kabcenall, *Do Bad Outcomes Mean Substandard Care?*, 265 JAMA 1995 (1991).

121. NAIC, *supra* note 15, at 68-69 (Table 2.10). Multidefendant cases also have higher defense costs, rising in step with the number of defendants.

122. For 1984 closures, the GAO survey found that claims took an average of 16.4 months to be reported (versus the average for NAIC incidents of 16 months) and an average of 25.0 months to be disposed of (versus the NAIC average of 21). Compare U.S. GAO, *supra* note 27, at 32, 82 (Table V. 13), with Table 1 *infra*.

123. On the status of children and the two reforms, see *Chaffin v. Nicosia*, 310 N.E.2d 867 (Ind. 1974) and its discussion at *supra* note 9 and accompanying text.

justify the nationwide wave of malpractice reform. Most notably for the statute of limitations, at the time of Indiana's reforms, the state faced the same average delay in reporting of adult claims as the rest of the country and unusually long delay for minors (Table 1) in Indiana. Like other parts of the country, however, Indiana was experiencing rapid growth in malpractice claims and premiums as well as sudden reductions in availability of liability coverage for medical practitioners. Indiana's occurrence-based statute of limitations was similar to many other states' reforms for children, but went beyond other states in the stringency of its legislative rejection of the discovery rule for adults.

This Article also analyzed the published empirical record to estimate the extent to which a strict rule may eliminate claims. The number of people affected surely goes beyond the few sympathetic plaintiffs in the instant cases. How far beyond? That can be argued two ways, based on the law and the facts as we have found them. On one hand, Indiana's occurrence-based statute looks much stricter than the provisions of sister states. Other states sometimes have a longer basic statute of limitations and often allow liberal tolling of the statute for undiscoverable injury, whereas Indiana applies only its version of the doctrine of fraudulent concealment. The parties and *amici* to *Martin v. Richey* and consolidated cases imply that there are large differences between Indiana's current regime and the more liberal allowances already available to other tort claimants in Indiana—and malpractice claimants in other states.

The facts about the 1970s long tail of cases nationally, which go well beyond Indiana's basic two-year adult limit, can be read to support this view, as shown in our review of published data from the NAIC's near-census of malpractice claims closed in 1975-78: Incidents with slow reporting in the reform era constituted at least 5% of the total for children, potentially as much as 15% or more for adults (Tables 2 and 3). It is impossible to tell with certainty just what circumstances allowed long-tail claimants to delay claims in the various states, and many claimants of the type who had longer reporting times under liberal rules surely could accelerate their claim filings under stricter rules. If stricter rules had actually foreclosed 15% or more of incidents, studies of the effect of reform on claims frequency and premiums would have found a larger effect than the 5% to 10% diminution actually estimated.

On the other hand, a closer reading of the law suggests that Indiana's occurrence-based statute is less stringent as applied than as written, given rather broad application of the doctrine of fraudulent concealment in Indiana. Moreover, except for the new 1975 limitation on children's late filing of suits, which offset the 1974 judicial liberalization, the legislative reform appears to have made little change in Indiana. For adults, the basic two-year, occurrence-based period was evidently the same before and after reform, the concealment doctrine was not legislatively reformed, and its judicial application seems to have continued unchanged after reform.

The facts about Indiana's pre-reform average delay to reporting of claims tend to support this view. The average time to report for adult claimants in Indiana was exactly the same as for the nation as a whole, in which about half the states applied a discovery rule (Table 1). For children, the delay in Indiana observed in the mid-1970s was actually over half a year longer than the national

average. At 26 months, the children's delay even exceeded the nominal allowance of the then two-year, occurrence-based statute of limitations; longer delays for children had been definitively allowed only in 1974, too late to have affected very many claims closed in the observation period.

In contrast with these ambiguities, it can be said with confidence that the impact of Indiana's occurrence-based statute fell disproportionately on cases of relatively severe injury, which predominated among long-tail cases nationally (Table 4). Thus, like "caps" on awards, reform of the statute of limitations seems to achieve its undoubted savings at the high end of the injury distribution. Of course, that is where a disproportionate amount of systems cost occurs. A final empirical finding, also unambiguous, is that delay after report is just as big a cause of "staleness" in claims resolution as delay before report (Table 5).

Policy makers in Indiana would be well served by more information, both about the law and the facts. Just how has the law actually been applied in courtrooms, before the 1975 reform and today? The record before the Supreme Court does not seem to answer these questions. Just what is the time distribution of actual claims? Neither the record nor readily available other data can answer. For the 1970s, learning more requires accessing the data underlying the NAIC's published report, and for the 1990s it means acquiring new data.

With regard to the "staleness" of foreclosed claims, we can observe empirically that the "long tail" of malpractice claims was indeed very long prior to reform nationally, given discovery rules and other exceptions applied in most states—a minimum of 3% of cases from the pre-reform era were ten to twenty-five years old at resolution. These are not likely to qualify as fresh cases by anyone's definition.

The aphorism that Indiana's statute of repose "declare[s] the bread stale before it is baked"<sup>124</sup> has a fine ring to it. But it uncritically accepts that the asserted legal *cause of action* is the "bread" in danger of becoming stale. This seems erroneous. A cause of action has no inherent freshness nor staleness. Indeed, it has no independent existence. An action springs into being when a claim is filed and judges allow it to go forward. A legal assertion has no measurable attribute apart from what judges allow it to have within the confines of a courtroom or deposition chamber.

Thus, we appreciate the "lawsuit as bread" metaphor for its value in provoking discussion. But it seems to us that a more apt policy formulation is whether the baker's proposed *ingredients* are so stale that any resulting confection will be unsafe for consumption.

What can be fresh or stale is thus not the legal assertion of a claim but rather the claim's underlying evidence, which is of two types. One is factual testimony about particular real-world events. Ordinary factual testimony can certainly go stale. Witnesses can forget (or reinvent), move out of state, or die. Written records can be lost or routinely destroyed. The second and more subtle type of staleness relates to expert opinion. Expertise is time sensitive (partly explaining why experts charge so much per hour). Accepted wisdom of one era is normally

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124. *Martin v. Richey*, 674 N.E.2d 1015, 1027 (Ind. Ct. App. 1997) (citation omitted).

overwritten with new and improved expertise, never again to appear truly expert. So, in an oddly reverse way, the "staleness" problem with medical opinion is that it can be inappropriately fresh for an old case.

Is any factual testimony delayed over two years old stale? This seems implausible. Medical records are the basic stuff of medical lawsuits. They can be maintained indefinitely. Medically, it is notable that good medical practice requires cumulating evidence on a patient's medical history, including, for example, whether patients still have their appendices or any history of allergic reactions even if discovered long before.<sup>125</sup> Legally, it is notable that the Indiana legislature accepted that evidence about treatment of children could remain acceptably fresh for up to eight years. Physical records and human memories surely do not differ in their ability to retain freshness according to the age of the patient being remembered. (Nor does it seem that medical expertise about childhood care changes more slowly than that for adults.)

Consider the not uncommon case where a mother and her infant are both injured in childbirth, perhaps by the same mis-administered anesthesia for a cesaerian or the same slip of a scalpel. We see no "freshness" reason that mom should have two years to sue in her own right but eight on behalf of her daughter. The reason for allowing children longer (yet not to age of majority) is to allow more time for discovery because their developmental circumstances merit the extension. Injury to adults that is hidden for other reasons seems very similar.

What then of expert testimony? Unlike medical records, medical wisdom from one era cannot readily be preserved on file, particularly not given that textbook wisdom must be modified for courtroom presentation in light of circumstances and actual medical custom. The problem is that medical practice and hence legal standards, improves over time. In the real world this is a very good thing. But in the courtroom, continuous improvement creates difficulty in accurately recapturing practice standards and hence legal duties from many years before, both in expert testimony and in the minds of factfinders at trial. Common sense, though no empirical evidence, suggests that good medical practice changes much more over a decade, say, than does good driving practice—or, for that matter, good bread-baking practice.

Accordingly, a shorter malpractice statute than auto tort period seems justified. But that still does not address the discovery rule. There, the key issue seems to be the balance between factual facts and medical facts. Consider the two paradigm cases of "foreign object" and "delay in diagnosis." A foreign

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125. Empirically, one would like to have expert medical assessments of medical records and claims files to assess the relative accuracy of results in new versus old cases. A growing number of studies have undertaken such difficult and expensive data collection, most but not all finding relatively good agreement between legal results and independent expert opinion. *See, e.g.*, Mark I. Taragin et al., *The Influence of Standard of Care and Severity of Injury on the Resolution of Medical Malpractice Claims*, 117 ANNALS OF INTERNAL MED. 780 (1992) (noting that 62% of malpractice claims are justifiable and that doctor's conduct did not conform to standard of care). *But see* Localio et al., *supra* note 24; Brennan et al., *supra* note 24. Unfortunately, vintage of the case when legally determined has not been a subject of such inquiries.

object is a physical thing, injury results from active misfeasance, and proof of causation and substandard care will turn on relatively factual testimony. A missed diagnosis is a cognitive error of omission, and proof of malpractice is crucially dependent on the level of expertise applicable at the time and under the circumstances. Accordingly, a preferable discovery exception would distinguish late discovery of real-world facts from late application of virtual-world medical expertise.

We end with a comment and a plea. It is an interesting commentary on public decision-making that legislatures and judiciaries combine to set policy on statutes of limitations. There is an astonishing difference between policy-making attributes in the two arenas. Legislatures can gather facts about whole populations affected by a phenomenon or social system, consider budgetary implications, and generally do a broad cost-benefit analysis across all types of cases to be affected in light of perceived popular and political opinion and pressures—though they cannot foresee all implementation problems or unexpected consequences of their decisions.<sup>126</sup>

Judiciaries often have to deal with particularized anomalies of implementation, but they also set general policy through common law adjudication and constitutional litigation. They do so by resolving a single case or controversy, typically a test case carefully selected by the party or parties seeking change—which is very unlikely to be representative of the broad class to be affected by a decision.<sup>127</sup> Not only do appellate judges see atypical cases, but they are also handicapped in informing themselves about general phenomena in any individual case. Legal practice assures good presentation of the specific facts of individual cases, but no presentation about how typical a test case is or about what countervailing other cases may exist.

*Amicus* briefs are the classic way that courts can receive a broader perspective. In this instance, though, none of the *amici* takes a broad perspective, either. Instead, they are simply the parties writ large—and with deeper pockets: One side represents potential defendants and their insurers; the other, injured people whose cases are strong enough and whose injuries are severe enough to interest a contingent-fee attorney. No one represents the whole universe of

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126. See JEFFREY L. PRESSMAN & AARON WILDAVSKY, IMPLEMENTATION: HOW GREAT EXPECTATIONS IN WASHINGTON ARE DASHED IN OAKLAND (3d. ed. 1984) (providing the classic statement of this in the policy literature).

127. Only difficult and atypical controversies go to trial to begin with; more typical, straightforward cases are typically settled. Even after trial begins, many cases settle before submission to jury or entering of judgment; others settle on appeal before any appellate decision. The proportion of cases reaching appellate decision is minuscule, but they are the raw material from which are made all common law rules and constitutional determinations. In the national survey of claims closed in 1984, 6.8% reached trial, 5.2% reached verdict, and 2.0% reached appeal (including settlements before appellate decision). U.S. GAO, *supra* note 27, at 37 (Table 2.20) (omitting a small share of cases going to arbitration or otherwise not in the conventional process). NAIC, *supra* note 15, at 75 (Table 2.11), does not present its information on disposition so as to allow a similar calculation.

patients, who are at only potential risk of injury under medical care, but whose medical fees and health insurance premiums must fund the whole liability system.

One wishes for a better way for each type of public decision maker to partake of the strengths of the other.

Finally, our plea is for further advances in public record keeping in support of judicial management. A widely acclaimed management axiom is that if you can't measure it, you can't manage it.<sup>128</sup> The judicial system generates and files innumerable reams of paper, but almost no routinely abstracted data. Both students of malpractice litigation and lobbyist/lawyers are driven to insurance records in the absence of systematic, accessible, and relevant official judicial information.<sup>129</sup> Even simple record keeping could help courts set better benchmarks to aid in ongoing administration and management—and thus partake of broader information in more legislative fashion.

All Indiana trial judges are currently required to submit quarterly statistical reports to the Division of State Court Administration. These reports contain only very general data presented on an aggregated basis, however. Information presented includes such matters as the numbers of new case filings, of cases by method of disposition (jury trial, bench trial, dismissal, etc.), and of cases currently pending. The categories of civil cases are especially general, such as civil plenary, civil tort, domestic relations, and so on. State-wide statistics are then generated, compiled into an annual report, and distributed rather widely.<sup>130</sup>

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128. The first author originally saw this point made in GORDON CHASE & ELIZABETH C. REVEAL, *HOW TO MANAGE IN THE PUBLIC SECTOR* (1983), though it appears to be widespread. *See, e.g.*, H. JAMES HARRINGTON, *BUSINESS PROCESS IMPROVEMENT—THE BREAKTHROUGH STRATEGY FOR TOTAL QUALITY, PRODUCTIVITY, AND COMPETITIVENESS* (1991). One suspects that the original source is Sir William Thomson, Lord Kelvin, 1824-1907, Baron Kelvin of Largs, scholar of thermodynamics, originator of Kelvin absolute temperature scale, and father of the first successful transatlantic telegraph cable: "If you cannot measure it, you cannot improve it." *See, e.g.*, Workgroup for Electronic Data Interchange, *1998 National Conference HIPAA Implementation: The Role of NCVHS* (visited June 16, 1998) <<http://www.wedi.org/htdocs/membersonly/Detmer/Wedi98/sld007.htm>>.

129. An important distinction must be made between *data* and *information*. Data is accessible, manipulable, and re-analyzable. The best form is micro-data, meaning that the unit of observation is the recording of individual cases with entries for everything which happens to it. This input can then be retrieved for generations to come and analyzed in the context of whatever issue confronts future administrators. The possibilities are only limited by the detail of the original input.

Information, on the other hand, is usually a hard copy report. It is inaccessible for almost any use other than the very specific one envisioned at the time the information was created and collected. Even a detailed set of published tables, as in the NAIC information used for this Article, inevitably leaves many questions unanticipated and unanswered. *See, e.g., supra* notes 15, 95, 111-12.

130. *See, e.g.*, DIVISION OF STATE COURT ADMINISTRATION, 1996 INDIANA JUDICIAL REPORT (1997).

This approach makes for a good snapshot of status and for good history.

But good analysis and management call for more. The problem is twofold: First, the current statistical reporting does not ask enough questions—or, for that matter, sufficiently focused and detailed questions. For example, policy makers need to know how many cases there are by subtypes of tort (e.g., personal injury, including medical malpractice, products liability), how long they take to reach each step to resolution, and how often problems of various types arise along the way. Second, the information is kept as reports rather than as *data*, that is, specific information kept for each case (quantitative and qualitative) and hence re-analyzable in the future. Given only a hard-copy, statewide report, a future manager can know only what a prior compiler chose to include. She cannot break out data more finely or in different categories—for example by urban/rural location, number of senior judges by district, or in any other way.

Two recent Supreme Court initiatives illustrate the feasibility and desirability of expanding data collection and improving its archiving for at least some projects. The first of these initiatives addressed a troublesome backlog in cases involving children.

The Supreme Court spent all of 1996 assembling the most comprehensive data ever collected about how Indiana's courts handle cases involving abused or neglected children. Hundreds of juvenile judges and magistrates, office of family and children directors and case-workers, guardians and court-appointed special advocates, parents, and practitioners contributed toward this effort.<sup>131</sup>

The second initiative involved the development of a weighted caseload measuring system. For 18 months, nearly one-third of Indiana judges and magistrates kept logs and made thousands of entries to determine how much time each sort of case requires on average. The result was a "measuring stick" which legislators can use in assessing requests for new courts and which the judiciary can use in making the most of existing courts.<sup>132</sup> While these initiatives necessitated a great deal of special data collection, they also facilitated making substantial improvements.

If done regularly, other straightforward reporting and maintenance of judicial information might help inform policy making—and also help make advocates' arguments better informed in cases like this one. For example: What proportion of torts arise from medical care? How many of these involve licensed providers as against drug companies and medical manufacturers not protected by reform? How often do issues of discovery arise? Such judicial information would not answer questions about the number and types of potential cases deterred by current judicial practice, but it would make a major contribution to understanding.

The systematic collection of such detailed data could impose new costs, at

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131. Chief Justice Randall T. Shepard, State of the Judiciary Address, in 1 DIVISION OF STATE COURT ADMINISTRATION, 1996 INDIANA JUDICIAL REPORT 3 (1997).

132. *Id.* at 5.

both the trial court level where it would be collected and at the central level where it would be entered and compiled. Economies could be achieved by having a smaller set of routinely reported information, with special samples or studies done each year on one area of interest, or done retrospectively as deemed appropriate.<sup>133</sup> Start-up costs would be highest, maintenance costs lower. However, the benefits—for the judiciary, other policymakers, and academic analysts—would continue to accrue forever.

Substantial help in data matters might come from academia, certainly from the public universities that are a sister branch of state government. Social scientists crave social data. Many graduate students spend many unpaid hours building data bases of less import than this. One can envision useful collaborations between courts and researchers with appropriate safeguards for confidentiality, though most court data are public. Researchers would also gravitate toward more complex, longer term analyses than policy makers typically need, but such efforts could be separately funded, as research is today. Some institutional creativity and core funding would be needed to create and nurture such a symbiotic relationship over time, but it could be done.

In *Martin v. Richey* and associated cases, the Supreme Court of Indiana has been asked to steer the constitutional ship of state between the Scylla of insurance crisis and physician flight and the Charybdis of denial of access to the courts. As the parties and *amici curiae* have structured the dispute, the justices have been well informed about the horrible nature of each prospective peril. But the Court remains wholly uninformed about the likelihood of either crash given any particular adjustment of course or speed—or about the number of casualties likely to be sustained.

Let us hope that in the future the waters will be better charted.

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133. The two studies just noted are example of special studies. *See supra* notes 131-32. Attributes reported on all cases filed would be the basic data. For the story of one productive social-medical data set, see Christopher R. Blagg et al., *Here Are (Almost All) the Data: The Evolution of the U.S. Renal Data System*, 14 AM. J. KIDNEY DIS. 347 (1989).

## Appendix

### PROPOSED LEGISLATIVE "FINDINGS" NOT PART OF FINAL ACT<sup>134</sup>

#### SECTION 1. The general assembly finds that:

- (a) The number of suits and claims for damages arising from professional patient care has increased tremendously in the past several years and the size of judgments and settlements in connection therewith have increased unreasonably.
- (b) The effect of such judgments and settlements, based frequently on new legal precedents, have [sic] caused the insurance coverage [sic] to uniformly and substantially increase the cost of such insurance coverage.
- (c) These increased insurance costs are being passed on to the patients in the form of higher charges for health care service and facilities.
- (d) The increased costs of providing health care services, the increased incidents [sic] of claims and suits against health care providers, and the unusual size of such claims and judgments, frequently out of proportion to the actual damage sustained, has [sic] caused many liability insurance companies to withdraw from the insuring of high risk health care providers.
- (e) The rising number of suits and claims is forcing health care providers to practice defensively, viewing each patient as a potential adversary in a lawsuit, to the detriment of both the health care provider and the patient. Health care providers [sic] for their own protection, are often required to employ excessive diagnostic procedures for their patients, unnecessarily increasing the cost of patient care.
- (f) Another effect of the increase of suits and claims and the costs thereof is that some health care providers decline to provide certain health care services which in themselves entail some risk of patient injury.
- (g) The cost and difficulty in obtaining insurance for health care providers discourages young physicians from entering into the practice of medicine in the state of Indiana, resulting in the loss of physicians to other states.
- (h) The inability to obtain or the high cost of obtaining insurance affects the medical and hospital services available in the state of Indiana to the detriment of its citizens.
- (i) Some health care providers have been forced to curtail the practice of all or a part of their profession because of the non-availability or high cost of liability

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134. *See supra* note 12 and accompanying text.

insurance.

(j) The cumulative effect of suits and claims is working both to the detriment of the health care providers and to the citizens of this state.



**APPENDIX 1**  
**BRIEF OF AMICUS CURIAE**  
**INDIANA TRIAL LAWYERS ASSOCIATION\***

**I. INTRODUCTION AND SUMMARY OF ARGUMENT**

Melody Martin alleges that her doctor negligently failed to detect her breast cancer, affirmatively advised her to forgo a biopsy that might have detected it, and concealed his knowledge of important medical facts from her. The question presented in this tragic case is whether Indiana residents like her are left utterly remediless by the two-year, occurrence-based medical malpractice statute of limitations. Ind. Code § 27-12-7-1(b).

The Court of Appeals correctly held that the statute violates Art. I, § 12 and Art. I, § 23 of the Indiana Constitution. These guarantees are central elements of Indiana's proud constitutional heritage and should not be reduced to mere echoes of the federal due process and equal protection clauses. Section 27-12-7-1(b) abrogates all remedies for medical malpractice injuries after two years have elapsed, even if a plaintiff had no reasonable way to know that she had been injured. As the Court of Appeals explained, the statute operates in an "Alice-in-Wonderland" way, foreclosing Melody Martin's right to a remedy before her cause of action had even accrued. 674 N.E.2d 1015, 1027 (decision below). "'It is sought here to declare the bread stale before it is baked.'" *Id.* (citation omitted). Such a statute cannot possibly be squared with Art. I, § 12's guarantee that "every person" "shall" receive a "complete" remedy for injuries to her "person." To decide otherwise would render Art. I, § 12 a nullity — "only a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will." *Edwards v. California*, 314 U.S. 160, 186 (1941) (Jackson, J., concurring).

In addition, § 27-12-7-1(b) violates Art. I, § 23 because it targets particular injuries — those arising from medical malpractice — for a unique burden: while all other tort plaintiffs enjoy a "discovery-based" statute, med-mal victims must sue within two years of the occurrence, even if (as here) they could not reasonably know of their injury until after the two years had passed. Yet the Constitution (specifically Art. I, § 12) treats all injuries equally and bars invidious discrimination among them. If Melody Martin's payment to Dr. Richey for his services had been fraudulent, any suit he brought would have enjoyed the benefit of a discovery rule. But she is singled out for a harsher rule when she seeks redress for her life-threatening injuries.

As the Court of Appeals explained, the statute violates § 23 in another way: not only does it discriminate *between* med-mal and other tort plaintiffs, it also unreasonably differentiates *among* med-mal victims. The statute penalizes those, like Melody Martin, who through no fault of their own cannot discover the malpractice until after two years have passed. 674 N.E.2d at 1023.

The precedent cited by petitioner is inapposite in light of this Court's holding

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\* In opposition of petition to transfer, *Martin v. Richey*, 674 N.E.2d 1015 (Ind. Ct. App. 1997). The authors would like to thank Ned Miltenberg for his substantial assistance in the preparation of this Brief. The *Indiana Law Review* editorial staff did not edit this Brief. It is printed here in its original form.

in *Collins v. Day*, 644 N.E.2d 72 (Ind. 1994), that Art. I, § 23 is to be governed not simply by the minimum rationality test of the Fourteenth Amendment but rather requires that “legislative classifications be ‘just,’ ‘natural,’ ‘reasonable,’ ‘substantial,’ ‘not artificial,’ ‘not capricious,’ and ‘not arbitrary.’” 644 N.E.2d at 79. Section 27-12-7-1(b) cannot pass this test.

## II. ARGUMENT

### A. The Statute Violates Art. I, § 12

The issue is not, as one of petitioner’s *amici* contends, the Legislature’s abstract “right to alter the common law” (IDLA Br. 1); such power of course exists, but only so long as legislative “change[s] do[] not interfere with constitutional rights.” *State v. Rendleman*, 603 N.E.2d 1333, 1336 (Ind. 1992). Accordingly, the real question is whether the legislature may, consistent with Art. I, § 12, deprive persons like Melody Martin of *any remedy at all* by requiring them to sue before they knew (or reasonably could know) that their claims exist. In *Chaffin v. Nicosia*, 261 Ind. 698, 703-04, 310 N.E.2d 867, 870 (1974), this Court emphasized that such a rule “would raise substantial questions under the Article I, § 12 guarantee of open courts and redress for injury to every man, not to mention the offense to lay concepts of justice.”

#### 1. The 1816 Constitution

The right to a remedy guarantee was originally contained in Art. I, § 11 of the 1816 Constitution. Although little convention history regarding this provision has survived, *see* 1 Charles Kettleborough, CONSTITUTION MAKING IN INDIANA 83 n.1, 88 n.5 (1916), history reveals its meaning clearly.

Art. I, § 11 was adopted against a backdrop of centuries of concern about governmental interference with access to justice, stretching back to Magna Carta. *See* Judge William C. Koch, Jr., *Reopening Tennessee’s Open Courts Clause: A Historical Reconsideration of Article I, Section 17 of the Tennessee Constitution*, 27 U. MEM. L. REV. 333, 349-66 (1997). Lord Edward Coke, seventeenth century England’s preeminent jurist and commentator, revitalized the Great Charter and transformed it into a font of Anglo-American liberties. William S. McKechnie, MAGNA CARTA 120-21, 178 (2d ed. 1914). According to Coke, Magna Carta expressly guaranteed that “every subject of this realme, for injury done to him ... by any other subject ... without exception, may take his remedy by the course of the law, and have justice, and right for the injury done to him, freely without sale, fully without any denial, and speedily without delay.” 1 Edward Coke, THE

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1. A statute of limitations is invalid even under rational basis scrutiny if it provides merely an “illusory” opportunity to vindicate a state-recognized right. *Mills v. Habluetzel*, 456 U.S. 91, 97 (1982); *Pickett v. Brown*, 462 U.S. 1, 12 (1983). In *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982), six Justices held that not even minimum rationality was satisfied by a statute depriving a plaintiff of a cause of action despite her diligent pursuit of redress through the state system, based solely on events beyond her control. *See id.* at 442 (Blackmun, J., joined by Brennan, Marshall, and O’Connor, JJ., concurring); *id.* at 444 (Powell, J., joined by Rehnquist, now C.J., concurring in the judgment). This Court should construe the Indiana Constitution so as to avoid a question as to the *federal* validity of § 27-12-7-1(b).

SECOND PART OF THE INSTITUTES OF THE LAWS OF ENGLAND \*55 (London, E.&R. Brooke 1797). Coke thus “read[] into Magna Carta the entire body of the common law of the seventeenth century.” McKechnie, MAGNA CARTA at 178. Blackstone similarly emphasized the common law “right of every Englishman” to “apply[] to the courts of justice for redress of injuries.” 1 William Blackstone, COMMENTARIES ON THE LAWS OF ENGLAND 141 (1765). These principles were later famously invoked by Chief Justice Marshall in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (right to a remedy is “the very essence of civil liberty”).

“The American colonists were intimately familiar with Coke,” *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 29 (1991) (Scalia, J., concurring in judgment), and they regularly invoked Coke and Magna Carta in challenging the constitutionality of many of the infamous Parliamentary enactments that spawned the Revolution, such as the Navigation Act of 1761, the Stamp Act of 1765, the Intolerable Acts of 1774, and the Restraining Act of 1775.<sup>2</sup>

In particular, the Stamp Act of 1765 “awakened” Americans “to the fact that Parliament did not recognize the English constitution necessarily followed the flag.” William F. Swindler, MAGNA CARTA: LEGEND AND LEGACY 216 (1965). Although the Stamp Act was nominally intended to raise general revenues by taxing official documents, its principal effect was severely to restrict access to the civil justice system. Brogan, HISTORY at 116; Edmund S. Morgan & Helen M. Morgan, THE STAMP ACT CRISIS: PROLOGUE TO REVOLUTION 126, 137, 145, 146, 175-86 (3d ed. 1992). “In most colonies there was no interruption in the trial of criminals, for the Stamp Act imposed no tax on the documents used in criminal cases. *It was only the civil courts which were closed.*” *Id.* at 184 (emphasis added). Importantly, when James Otis argued that the Navigation Act of 1761 and the Stamp Act were void, he cited Coke and Magna Carta for the proposition that Parliament could not abridge common law rights inasmuch as “‘there are Limits beyond which if Parliaments go, their Acts bind not.’” *Id.* at 146 (citation omitted).

Unfortunately, after Independence the first state legislatures picked up where Parliament left off, abrogating the common law at whim and prompting Jefferson, Madison, and many others to decry the “‘elective Despotism’” of popularly elected legislatures. Gordon S. Wood, THE CREATION OF THE AMERICAN REPUBLIC: 1776-1787, 451-2 (1967) (quoting Jefferson). *See Book v. Office Bldg. Comm'n*, 238 Ind. 120, 161, 149 N.E.2d 273, 294 (1958). “By the mid-1780s, many American leaders had come to believe that the democratic element of their mixed republics — the state assemblies — . . . were the political authority most to be feared.” Gordon S. Wood, *State Constitution-Making in the American Revolution*, 24 RUTGERS L.J. 911, 923 (1993). State legislatures were abridging what Americans understood as their natural, inherent, and inalienable common law rights. “The confiscation of property . . . and the various devices

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2. Hugh Brogan, THE HISTORY OF THE UNITED STATES 124-25 (1990 ed.); A.E. Dick Howard, THE ROAD FROM RUNNYMEDE: MAGNA CARTA AND CONSTITUTIONALISM IN AMERICA 133-37 (1968).

suspending the ordinary means for recovery of debts, despite their ‘open and outrageous . . . violation of every principle of justice,’ were not the decrees of a tyrannical and irresponsible magistracy, but laws enacted by [highly representative] legislatures.” Wood, *CREATION* at 404 (citation omitted). *See also* Stanley Elkins & Eric McKittrick, *THE AGE OF FEDERALISM* 10-11, 61, 702 (1993); Brogan, *HISTORY* at 184, 214-15.

“[D]epriving people of common law causes of action for damages” was not infrequent. William E. Nelson, *AMERICANIZATION OF THE COMMON LAW* 91-92 (1975) (emphasis added). State legislatures not only closed courts but also assumed their powers, “interfering in causes between parties, reversing court judgments, [and] staying executions after judgments.” Wood, *CREATION* at 407. State legislatures “even prohibit[ed] court actions” from being commenced in certain matters, such as “land titles or private contracts involving bonds or debts.” *Id.* (emphasis added). Tories were often deprived of judicial remedies not only in pending cases but also by statutes that abrogated common law causes of action *before* individuals’ claims had accrued. Forrest McDonald, *NOVUS ORDO SECLORUM: THE INTELLECTUAL ORIGINS OF THE CONSTITUTION* 155 (1985). “[T]he major constitutional difficulty experienced in the Confederation period [was] the problem of legal tyranny, the usurpation of private rights under constitutional cover.” Wood, *CREATION* at 412.

State constitutions were amended throughout the 1780s and 1790s in no small part to address these very problems. The separation of powers, substantive restrictions on legislative power, and explicit recognition of individual liberties — such as the right to a remedy — were all attempts to cabin legislative authority and to guarantee the availability of common law remedies. Wood, *CREATION* at 430-63. Significantly, although only two of the original thirteen colonies guaranteed open courts or complete remedies to their citizens in 1776, by 1796 half of the sixteen states in the Union had adopted such clauses, including all four of the states whose constitutions served as models for Indiana’s Bill of Rights. *See* Koch, *supra*, at 367.

The 1816 Framers were quite familiar with this history and “with the principles of both the Declaration of Independence and the U.S. Constitution.” John D. Barnhart & Dorothy L. Riker, 1 *HISTORY OF INDIANA: INDIANA TO 1816*, 444 (1971). “More than half the delegates had some legal training or experience.” Howard H. Peckham, *INDIANA* 44 (1978). They “were, for the most part, educated men. They were scholars in the history and philosophy of government. Their personal memory reached back into the atmosphere of the Revolution . . . when the principles of constitutional government were first formulated.” James W. Noel, *In Re: Proposed Constitutional Convention*, 5 IND. L.J. 373, 377 (1930).

The 1816 Framers designed Indiana’s first constitution with considerable care. The “process involved . . . was *not simply copying the constitutional law of another state, but was a matter of selection.* . . . [T]he delegates seem to have searched through several constitutions to find the sections which embodied the provisions they considered preferable . . . .” Barnhart & Riker, *HISTORY* at 449-50 (citation omitted; emphasis added). The 1816 Framers’ independent cast of mind was particularly evident in Article I, the Bill of Rights, which was

assembled from portions of the constitutions of four states (Ohio, Kentucky, Tennessee, and Pennsylvania, each of which guaranteed then, as now, remedies to injured persons) as well as the federal Constitution. John D. Barnhart, *VALLEY OF DEMOCRACY* 191-92, 194 (1970).

In this light, Art. I, § 12's guarantee of a right to a remedy, which was deliberately adopted to safeguard private rights by restraining legislative power, must truly "be considered as though every word had been hammered into place." *Warren v. Indiana Tel. Co.*, 217 Ind. 93, 102, 26 N.E.2d 399, 403 (1940).

## 2. The 1851 Constitution

The 1851 Framers amended the right to a remedy guarantee by (i) adding the word "completely" to Art. I, § 12, and also (ii) separating the first full sentence with a semicolon, which underscores that the provision secures two independent rights: the right of access to the courts and the right to a complete tort remedy. IDLA contends that these changes were not meant to affect the provision's meaning. IDLA Br. 5. That could be so only in the sense that the Framers apparently believed that the meaning was already implicit in Art. I, § 11 of the 1816 Constitution and merely needed clarification. Indeed, IDLA itself concedes that the addition of the term "completely" reflected "a more accurate and complete translation" of Coke's text. IDLA Br. 8.

Tellingly, the 1851 Framers authorized only three narrow changes in the common law. Two changes related to the prosecution and defense of criminal charges. The third made it easier for plaintiffs to pursue civil suits. 674 N.E.2d at 1025 & n.8.

In contrast, those same Framers rejected — on three separate occasions — proposals to authorize the legislature to "abolish the common law of England," to "alter, amend, or repeal any law of the State," and to "systematize" and codify "the whole body of law of the State." 674 N.E.2d at 1025 n.7. That such proposals were even made demonstrates that the Framers believed that the legislature was without power to abrogate common law remedies in the manner of § 27-12-7-1(b) and could not acquire that power absent constitutional amendment.

IDLA insists that this history is irrelevant and that these three proposals were not only rejected but ridiculed because the Framers appreciated "the perpetual nature of the common law and its integral role in the body of law that governs non-code systems." IDLA Br. 6. That is just the point. The common law has protected individuals against negligently-caused injuries since at least 1367. C.H.S. Fifoot, *HISTORY AND SOURCES OF THE COMMON LAW* 66-78 (1949). E.g., *Everard v. Hopkins*, 80 Eng. Rep. 1164 (1634) (doctor liable for personal injuries); *Ross v. City of Madison*, 1 Ind. 281, 284 (1848) (applying common law negligence). See 1 Blackstone, *COMMENTARIES* at 106-08; 2 Blackstone, *COMMENTARIES* at 438.

Americans' persistent appeals to the common law in the decades before and after the Revolution manifested "a regard for its virtues that seems almost mystical." Morton J. Horwitz, *THE TRANSFORMATION OF AMERICAN LAW: 1780-1860* 5 (1977) (citation omitted). Just as "Coke insist[ed] that the common

law is the every essence of English justice,”<sup>3</sup> Revolutionary-era Americans maintained that the common law was the “embod[iment] [of] the principles of justice, equity, and rights.”<sup>4</sup> A principled respect for the common law, and not merely practical concerns over the feasibility of codification, explains why proposals to expand the legislature’s powers, such as through codification, failed in Indiana in 1850,<sup>5</sup> just as similar proposals largely failed elsewhere throughout the century.<sup>6</sup>

Not only did the framers refuse to expand the legislature’s powers to allow it to abrogate common law rights and remedies, but in their official report to the people of the state summarizing their accomplishments, the Framers boasted that they had imposed more than a dozen “new” and “important” substantive and procedural rules expressly designed to “check and regulate the Legislative branch.” *Address to the Electors* (Feb. 8, 1851), reprinted in CONVENTION JOURNAL at 965 (emphasis added). These new restrictions limited the legislature’s power to confer special “privileges and immunities” on favored friends (Art. I, § 23); banned “local or special” laws (Art. IV, § 22); specified that “all laws shall be general, and of uniform operation throughout the state” (Art. IV, § 23); limited bills to a “single subject” (Art. IV, § 19); required that votes in the General Assembly be recorded in journals (Art. IV, § 12); mandated multiple readings of a bill before a vote (Art. IV, § 18); and prescribed that bills be “plainly worded” (Art. IV, § 20).

The 1851 Framers clearly would not have countenanced the legislative abrogation of common law remedies wholesale before claims had even arisen.

### 3. *Stare Decisis* Is Not Dispositive Here

Petitioner and his *amici* rely primarily on *stare decisis*. Yet they ignore both this Court’s express reservation of the specific question presented in this case in *Chaffin v. Nicosia*, 261 Ind. at 703-04, 310 N.E.2d at 870, and this Court’s repeated suggestions that statutes of limitation, to be valid, must afford a plaintiff a reasonable period to sue. *Bunker v. National Gypsum Co.*, 441 N.E.2d 8, 12 (Ind. 1982); *Short v. Texaco, Inc.*, 273 Ind. 518, 525, 406 N.E.2d 625, 630 (1980), *aff’d*, 454 U.S. 516 (1982); *Rohrbaugh v. Wagoner*, 274 Ind. 661, 664, 413 N.E.2d 891, 893 (1980). Many of the decisions cited by petitioner involve laws “alter[ing]” or “restrict[ing]” remedies,<sup>7</sup> or laws addressing specialized

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3. James R. Stoner, Jr., *COMMON LAW AND LIBERAL THEORY: COKE, HOBES, AND THE ORIGINS OF AMERICAN CONSTITUTIONALISM* 20 (1992).

4. Bernard Bailyn, *IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 31 (1967).

5. 2 DEBATES IN INDIANA CONVENTION 1850, at 1713-18, 1737-65, 1813, 1820-28, 1838-45, 1848-51, 1928-29 (1850).

6. Morton J. Horwitz, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 118-19 (1992); Lawrence M. Friedman, *A HISTORY OF AMERICAN LAW* 345 (1973); Howard, *ROAD* at 264.

7. *Johnson v. St. Vincent Hospital, Inc.*, 273 Ind. 374, 387, 404 N.E.2d 585, 594 (1980) (medical review panels).

contexts.<sup>8</sup> The statutes tested in these cases did not abolish remedies altogether.

Moreover, the decisions upon which petitioner relies were rendered without the benefit of the historical evidence advanced here. “The principle of *stare decisis* does not demand that we follow precedents that shipwreck justice.” *Harris v. YWCA of Terre Haute*, 250 Ind. 491, 237 N.E.2d 242, 244 (1968). Even the authorities petitioner cites recognize that “the Indiana remedies clause says something and must mean something, more than the treatment afforded it to date.” Jerome L. Withered, *Indiana’s Constitutional Right to a Remedy by Due Course of Law*, 22 RES GESTAE 456, 463 (April 1994). “The time to re-examine this important provision in our Indiana Constitution thus may have arrived.” *Id.* at 459.

The amicus brief of the State Medical Association unwittingly reveals that relatively few states have occurrence-based statutes without a discovery rule. Two-year occurrence statutes were invalidated in *Carson v. Maurer*, 424 A.2d 825, 834 (N.H. 1980), and, with respect to those like Melody Martin who could not discover their injury within 2 years, in *Nelson v. Krusen*, 678 S.W.2d 918, 922 (Tex. 1984) (statute “violates the open courts provision by cutting off a cause of action before the party knows, or reasonably should know, that he is injured”). Other state constitutions which informed Art. I of the 1816 Constitution have also been interpreted as invalidating statutes like § 27-12-7-1(b) on right-to-a-remedy grounds. See *Perkins v. Northeastern Log Homes*, 808 S.W.2d 809, 817 (Ky. 1991); *McCollum v. Sisters of Charity*, 799 S.W.2d 15, 19 (Ky. 1990); *Brennaman v. R.M.I. Co.*, 639 N.E.2d 425, 430-31 (Ohio 1994); *Hardy v. VerMeulen*, 512 N.E.2d 626, 628 (Ohio 1987), cert. denied, 484 U.S. 1066 (1988).<sup>9</sup>

Petitioner notes that the legislature has often altered the common law. IDLA cites Ind. Code § 1-1-2-1.<sup>10</sup> These arguments miss the point. Although the legislature unquestionably possesses the power to modify the common law, its power to do is cabined by constitutional constraints, such as Art. I, § 12. Section 12 does not limit the legislature’s ability to *expand* remedies (by restricting the common law doctrine of sovereign immunity, for example), or *reconfigure* them (e.g., through the *quid pro quo* of workers’ compensation), but it does establish a floor below which the legislature may not go. By eliminating Melody Martin’s remedy before she could even assert it, the legislature has passed that limit.

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8. *Pennington v. Stewart*, 212 Ind. 553, 558, 10 N.E.2d 619, 621 (1937) (noting special context of marriage and holding, in keeping with evolving social mores, that a husband has no property right to the affections of his wife).

9. Courts in other states have upheld statutes of limitation in medical malpractice cases, but chiefly under “minimum rationality” review rather than the kind of analysis we submit is required by Art. I, § 12, and chiefly where the plaintiff’s right to a remedy is not eliminated altogether.

10. IDLA errs in asserting that § 1-1-2-1 definitively establishes the relative hierarchy of law in Indiana. The provision lists state statutes above federal statutes, the state constitution above federal statutes, and omits any reference to federal administrative regulations.

### B. The Statute Violates Art. I, § 23

Section 27-12-7-1(b) “varies from the standard statute of limitation applicable generally to tort suits.” *Havens v. Ritchey*, 582 N.E.2d 792, 794 (Ind. 1991). The general statute, Ind. Code § 34-1-2-2(1), provides that an action must be commenced within two years after the cause of action *accrues*. “The legislature left it for the courts to determine when the cause accrues.” *Id.* Thus, whenever a foreign substance causes injury, a discovery rule is applied. *Barnes v. A.H. Robins Co.*, 476 N.E.2d 84, 87-88 (Ind. 1985).

In contrast, § 27-12-7-1(b) is a Procrustean statute that yields “brutal” results. *Hughes v. Glaese*, 659 N.E.2d 516, 518 (Ind. 1995). It discriminates against a discrete class of plaintiffs and a singular type of injury — even though the Constitution (in Art. I, § 12) commands that all injuries be treated equally. It discriminates against med-mal plaintiffs, particularly those whose claims do not even arise until after two years have passed. Petitioner’s contention that the statute is neutral because it applies, on its face, to all med-mal victims ignores the statute’s practical effect and recalls Anatole France’s epigram about the “majestic egalitarianism” of French law, which forbade rich and poor alike to beg in the streets.

Section 27-12-7-1(b) cannot be justified by hypothetical problems of stale evidence or unavailable witnesses. Every other tort case is governed by the generally applicable rule.<sup>11</sup> Equally unavailing is petitioner’s reliance on decades-old cases describing medical liability crises that have long passed (if they ever occurred). Section § 27-12-7-1(b) has outlived whatever utility it may once have had. It now serves as precisely the kind of special interest legislation that the 1851 framers sought to prohibit by adopting Art. I, § 23.

History reveals that thirty-four years of increasingly questionable performance by the legislature, John D. Barnhart, *The Democratization of Indiana Territory*, 43 IND. MAG. OF HIST. 8 (1947), led the 1851 framers to adopt more than a dozen measures to “check and regulate the Legislative branch.” “[U]nder the old constitution the assembly had” engaged in “continuous logrolling and innumerable concessions to particular interests who found the system conducive to their selfish ends.” 2 John D. Barnhart & Donald F. Carmody, *INDIANA: FROM FRONTIER TO INDUSTRIAL COMMONWEALTH* 87 (1954).

Although some of the delegates intended Section 23 to combat the problem of state-granted monopolies, *Collins*, 644 N.E.2d at 76-77, the provision was drafted in general terms. “It provides that if the Legislature grant to one set of persons a privilege, it shall grant the same privilege to all other persons.” 2 DEBATES 1850-51, at 1397. Proposals to limit the scope of the provision to banking were defeated. *Id.* at 1397-98. “[I]t recognizes a principle of justice, a departure from which would inevitably result in injury to some person or persons.” *Id.* at 1396. Notably, some delegates objected to the proposed amendment on grounds analogous to those used by petitioner to defend § 27-12-

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11. See *Clark v. Jeter*, 486 U.S. 456, 464-65 (1988) (invalidating special statute of limitation which departed from generally applicable rule).

7-1(b). The dissenting delegates argued that the legislature “can be trusted,” that the proposal would “cripple the energies of the State,” and that the legislature should be permitted to confer special privileges “to provide for the public interest.” *Id.* at 1396-97. These views did not prevail. The framers highlighted Section 23 in their report to the people of the state as one of the “chief amendments which we have thought useful to make.” *Id.* at 2042.

### III. CONCLUSION

This Court should deny the petition to transfer or, in the alternative, should affirm the judgment of the Court of Appeals.

Respectfully submitted,  
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**APPENDIX 2**  
**BRIEF OF AMICUS CURIAE**  
**INDIANA STATE MEDICAL ASSOCIATION\***

**THE MEDICAL MALPRACTICE ACT STATUTE OF  
LIMITATIONS IS CONSTITUTIONAL**

**A. Procedural Background.**

Since 1881, the Indiana General Assembly has provided that "actions for injuries to person or character shall be commenced within two years after the cause of action has accrued." The current general tort liability statute is found at Ind. Code 34-1-2-2. In 1941, to clear up confusion as to whether actions against physicians for malpractice sounded in contract or tort, the legislature amended Ind. Code 34-1-2-2 by providing a single limitations period for malpractice actions against physicians. It provided that "no action of any kind for damages based upon professional services rendered or which should have been rendered, shall be brought against physicians... unless said action is filed within two years from the date of the act, omission or neglect complained of." Ch. 116, § 1 (Acts 1941). This provision was retained and incorporated in Indiana's Medical Malpractice Act, as Ind. Code 34-4-19-1 (West. Annot. Code 1971), and is now found at Ind. Code 27-12-7-1. Thus, Indiana has had a two year occurrence statute of limitations for physicians for over 55 years.

Since it was enacted, the Indiana Supreme Court has repeatedly reviewed and affirmed the constitutionality of the Medical Malpractice Act, including its statute of limitations. In Johnson v. St. Vincent Hospital, 273 Ind. 374, 404 N.E.2d 585 (1980), as in other cases discussed below, Justice DeBruler upheld the statute's constitutionality, finding that it was enacted in response to critical problems affecting the public health and welfare. "Services of health care providers were being threatened and curtailed contrary to the health interests of the community because of the high cost and unavailability of liability insurance." Id. at 594. The legislative scheme includes a patient compensation fund, funded by physician surcharges and providing a government sponsored risk spreading mechanism for the benefit of malpractice claimants. Id. at 601.

Indiana courts are particularly reluctant to strike down statutes which courts have long held to be constitutional, Illinois Steel Co. v. Fuller, 216 Ind. 180, 23 N.E.2d 259 (1939); Strube v. Sumner, 385 N.E.2d 948, 950 (Ind. App. 1978), app. dismissed, 444 U.S. 1063, 100 S.Ct. 1002, 62 L.Ed.2d 745. Nevertheless, in amicus briefs filed in opposition to transfer in Martin v. Richey, 674 N.E.2d 1997 (Ind.Ct.App. 1997), the Indiana Trial Lawyers Association attacked the legitimacy of Johnson and its progeny. They argue that the statute as applied to persons who have not discovered their injuries within the 2-year period violates both Article I, 12 and I, 23 of the Indiana Constitution. Their arguments have no merit.

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\* In support of petition to transfer, Martin v. Richey, 674 N.E.2d 1015 (Ind. Ct. App. 1997). The *Indiana Law Review* editorial staff did not edit this Brief. It is printed here in its original form.

**B. Martin v. Richey Ignores and Contravenes Case Law Interpreting Article I, § 12 of the Indiana Constitution.**

Article I, § 12 provides as follows:

All courts shall be open; and every person, for injury done to him in his person, property, or reputation, shall have remedy by due course of law. Justice shall be administered freely, and without purchase, completely, and without denial; speedily, without delay.

Prior decisions of the Indiana Supreme Court and Court of Appeals which have considered challenges to the constitutionality of I.C. 27-12-7-1 on the basis of Article I, § 12 have uniformly upheld its validity. See, Cha v. Warnick, 467 N.E.2d 109 (Ind. 1985); Johnson v. St. Vincent Hospital, *supra*; Ledbetter v. Hunter, 652 N.E.2d 543, 547-48 (Ind. App. 1995); and Toth v. Lenk, 164 Ind. App. 618, 330 N.E.2d 336 (1975). See, also, Carmichael v. Silbert, 422 N.E.2d 1330 (Ind. App. 1981), finding the statute of limitations does not violate the due process clause of the Fourteenth Amendment.

During the same period, the Court upheld other occurrence statutes of limitations against Article I, § 12 challenges, including Bunker v. National Gypsum Company, 441 N.E.2d 8 (Ind. 1982)(three-year statute of repose from the date of exposure to asbestos); Woolworth v. Lilly Industrial Coatings, 446 N.E.2d 646 (Ind. App. 1983) (two year statute for latent diseases); Beecher v. White, 447 N.E.2d 622 (Ind. App. 1983)(ten year statute for deficiencies in improvements to real property); and Dague v. Piper Aircraft, 275 Ind. 520, 418 N.E.2d 207 (1981)(products liability ten year statute of repose).

The Court of Appeals decision in Martin v. Richey, *supra*, ignored this entire body of law, engaging instead in a flawed analysis of the “original intent” of its drafters.

**C. Martin v. Richey Is Based Upon An Inaccurate and Incomplete Historical Review.**

There is no record of what the 1850 convention delegates intended by enacting Article I, § 12 as part of the 1851 Constitution. A semi-colon to which the Martin opinion attributes great significance, was in fact a grammatical change made by the style committee. That committee reported that its changes did not affect the “sense” or substance of the article. There was no debate or comment made by the delegates regarding the revisions to Section 12.

The Martin decision also erroneously concludes that the addition of the language “justice shall be administered...completely and without denial” was intended to create a constitutional right to a “complete” remedy for all torts and was intended to prohibit any alteration of common law causes of action. There is no historic basis for such a surmise. No debates or reports exist which reveal the intent of the drafters of either the 1816 or 1851 versions of this provision. The original “open courts” clause (Article I, section 11 of the 1816 Constitution) copied similar language from founding documents of other states, including the Pennsylvania Declaration of Rights. Barnhart, Valley of Democracy 188-192

(1970); Bauman, Remedies Provisions in State Constitutions, 26 Wake Forest L.R. 237, 285-287 (1991).

Two committees of the 1850 constitutional convention drafted Article I, § 12, inserting language from Coke's seventeenth-century "reinterpretation" of Ch. 40 of the Magna Carta. Hoffman, By the Course of Law: The Origins of the Open Courts Clause of State Constitutions, 74 Oregon L.R. 1279, 1286-1298 (1995). Hoffman notes that Coke's language "does not support the interpretation that the court must fashion a remedy to vindicate every right. Rather, it describes how such remedies shall be administered by the courts: 'freely without sale, fully without any denial, and speedily without delay,' and 'by the course of the Law.'" Id. at 1294. "Nothing in [scholarly research has provided] any historical indication that Coke was concerned with the 'right to a remedy'...much less that such a concern ever entered the minds of the drafters of the state constitutions." Id. at 1290. The language of this clause of Article I, § 12 clearly applies to the "administration of justice" by the judiciary, not to regulation of legislative power.

#### **D. Martin Erroneously Interprets Article I, § 12 To Prohibit the Legislature from Limiting Common Law Causes of Action.**

Until the Martin decision, Indiana courts consistently upheld the authority of the legislature to alter common law rights and remedies. Cases dating from the last century, when judges would have been more familiar with the thinking of the Constitution's framers, uniformly reject the proposition that the Indiana Constitution hobbles the legislature's power to alter or abolish common law rights and remedies. See, e.g., Dinckerlocker v. Marsh, 75 Ind. 548 (1881); May v. State, 133 Ind. 567, 33 N.E. 352 (1892); and High, et al. v. Board of Commissioners of Shelby County, 92 Ind. 580, 590 (1883). This principle was recently reaffirmed in State v. Rendleman, 603 N.E.2d 1333, 1336-1337 (Ind. 1992).

The common law, created by successive judicial decisions in the context of specific cases, has been lauded for its adaptability. "It has always been understood that common law evolves over time to meet the demands of the day, in what Justice Brent E. Dickson has called: 'the march of Indiana common law.'" Shepard, The Importance of Legal History for Modern Lawyering, 30 Ind. Law Review 2 (1997). Had the delegates to the 1850 constitutional convention intended to preserve as inalienable the common law as it then existed, they surely would have done so clearly and unambiguously.<sup>1</sup>

Nelson v. Krusen, 678 S.W.2d 918 (Tex. 1984), which Martin makes its rule of decision, relies on a substantive due process analysis that both Indiana and the majority of other states have rejected. Nelson v. Krusen, at 921, holds that the Texas Constitution creates a "substantial right" to a remedy. However, Indiana

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1. Instead, they were critical of the delay and expense caused by arcane forms of pleading, unpredictability of "judicial legislation," and the lack of access to judicial opinions. See, 2 Debates in Indiana Convention, 1850, 1715, 1737, 1741-2, 1747, 1750, 1759.

courts have consistently held to the contrary.

There is no vested or property right in any rule of the common law, and the right to bring a common law action is not a fundamental right.

Scalf v. Berkel, 448 N.E.2d 1201, 1203 (Ind. App. 1993). See, also, Sidle v. Majors, 264 Ind. 206, 341 N.E.2d 763, 774 (1976); and Jamerson v. Anderson Newspapers, 469 N.E.2d 1243 (Ind. App. 1984).

Soundly reasoned decisions in other jurisdictions have rejected the rationale borrowed from Texas by the Martin court. See, Green v. Siegel, Barnett & Schultz, 557 N.W.2d 396 (S.D. 1996); Sanborn v. Greenwald, 39 Conn. App. 289, 664 A.2d 803 (1995), cert. denied; Choroszy v. Tso, 647 A.2d 803 (Me. 1994); and cases found in Appendix A attached hereto. If a “more fair method” for a limitations period would be to lengthen the period of time or adopt a discovery rule, the legislature should make this determination, as these arguments are “public policy considerations within the domain of the Legislature to address and modify if it deems such action to be in the public welfare.” Green v. Siegel, Barnett & Schultz, supra, 557 N.W. 2d at 404.

#### **E. Martin v. Richey Violates Canons of Constitutional Interpretation.**

It is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void. The opposition between the constitution and the law should be such that the judge feels a clear and strong conviction of their incompatibility with each other.

Fletcher v. Peck, 6 U.S. (Cranch.) 87 (Marshall, C. J.), quoted in Lafayette, Muncie & Bloomington R.R. Co. v. Geiger, 34 Ind. 185, 199-200 (1870). See, also Warren v. Indiana Telephone Co., 217 Ind. 93, 26 N.E.2d 399, 403 (1940)(modification of common law rights is a matter of legislative, not judicial wisdom).

The Martin v. Richey majority ignores this rule of deference, going out of its way to declare the statute unconstitutional. It pays lip service to rules of self-restraint requiring resolution of appeals on non-constitutional grounds, id. at 1022, but then finds the presence of factual issues regarding fraudulent concealment--which would toll the statute of limitations, render the constitutional issues moot, and dictate reversal of summary judgment on those grounds. Id. at 1027-1029. Since it could resolve the appeal on that narrow basis, it was unnecessary and improper for the Martin court to reach any constitutional issues.

#### **F. Martin Misapplies Collins v. Day in Finding a Violation of the Privileges and Immunities Clause.**

Article I, § 23 of the Indiana Constitution provides:

The general assembly shall not grant to any citizen, or class of citizens,

privileges or immunities which, upon the same terms, shall not equally belong to all citizens.

The analytical framework articulated in Collins v. Day, 644 N.E.2d 72 (Ind. 1994) focuses on classifications based on a group's "inherent characteristics." Historically, statutory classifications based on race, gender, illegitimacy, and other "inherent" group characteristics have been challenged under the Fourteenth Amendment to the federal constitution. Such classifications triggered a heightened scrutiny, while economic and other types of legislative classification were analyzed using a rational basis test. See, e.g., Kadrimas v. Dickinson Public Schools, 487 U.S. 450, 459 (1988); Bowers v. Hardwick, 478 U.S. 186, 189 (1986).

In Collins v. Day, this court articulated a two-prong test for measuring statutory classifications against Indiana's privilege and immunities clause:

First, the disparate treatment accorded by the legislature must be reasonably related to inherent characteristics which distinguish the unequally treated classes. Second, the preferential treatment must be uniformly applicable and equally available to all persons similarly situated. Id. at 80.

Appellate decisions applying the Collins tests, except for Martin and Harris v. Raymond, 680 N.E.2d 551 have not found violations of Article I, § 23. See, e.g., American Legion Post #113 v. State, 656 N.E.2d 1190 (Ind. App. 1995), trans. denied; Indiana High School Athletic Ass'n v. Avant, 650 N.E.2d 1164 (Ind. App. 1995), trans. denied; Dillon v. Chicago South Shore & South Bend Ry. Co., 654 N.E.2d 1137 (Ind. App. 1995), reh. denied, trans. denied; and McIntosh v. Melroe Co., (Ind. App. 1997), trans. denied.

Martin reluctantly upholds the validity and rationality of the Medical Malpractice statute of limitations, finding that "the classification is reasonably related to the goal of maintaining sufficient medical treatment and controlling malpractice insurance costs." Id. at 1022. However, it misapplies the second part of the Collins test, that the "preferential treatment must be uniformly applicable and equally available to all persons similarly situated." In Person v. State, 661 N.E.2d 587, 592 (Ind. App. 1996), trans. denied, Judge Riley for the court correctly applied this test in considering challenges to two different criminal statutes. Both laws prohibit carrying weapons without a license; however, the punishment for those under 18 is automatic and more severe than the adult penalty. The Person court found no disparate treatment: one law applied to all those under 18 and the other applied to those 18 and over. Similarly, the medical malpractice statute of limitations does not distinguish between medical malpractice and other tort plaintiffs or defendants. Rather, it establishes a two-year time after which, absent equitable tolling, causes of action for medical malpractice are time-barred for everyone.

It has been argued that all members of the class are not treated equally because those who do not discover the malpractice within the two years are barred from filing claims while those who do discover the malpractice within two years are allowed to proceed with their claims.

This is not different treatment because all malpractice claimants have two years from the date of the occurrence to file a claim.

Johnson v. Gupta, 682 N.E.2d 827, 831 (Ind. Ct. App. 1997)(reaffirming that Ind. Code 27-12-7-1 is consistent with both Article I, 12 and Article I, 23 of the Indiana Constitution). Similarly, the ten-year statute of repose for product liability actions, Ind. Code 33-2-2.5-5(b) was recently found to satisfy the second prong of the Collins test in McIntosh v. Melroe Co., 682 N.E.2d 822 (Ind. Ct. App. 1997), trans. denied.

Even assuming that the two different statutes of limitations for health care providers and other potential tortfeasors creates a “privilege” or “immunity,” it is reasonably related to the purpose of the classification. Health care providers possess the inherent distinguishing characteristic of working in the field of medicine, thus exposing themselves to professional malpractice claims, and requiring expensive malpractice insurance in order to continue their work. Providing a clear cut-off date for filing claims against such providers is rationally related to the Act's purpose of making affordable malpractice insurance available, so that physicians can continue to provide services to the public.

### Conclusion

Recognizing that “considerable deference should be accorded the manner in which the legislature has balanced the competing interests involved,” Johnson v. St. Vincent Hospital held the medical malpractice two year statute of limitations was consistent with both section 12 and 23 of Article I. Subsequent decisions have confirmed that the statute is consistent with due process and equal protection.

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## OTHER JURISDICTIONS - CASES HOLDING STATUTES CONSTITUTIONAL

Alabama - Bowlin Horn v. Citizens Hospital, 425 So.2d 1065 (Ala. 1982); Reese v. Rankin Fite Memorial Hospital, 403 So.2d 158 (Ala. 1981); Sellers v. Edwards, 265 So.2d 438 (Ala. 1972).

Arkansas - Owen v. Wilson, 260 Ark. 21, 537 S.W.2d 543 (1976).

California - Kite v. Campbell, 142 Cal. App. 3d 793, 191 Cal. Rptr. 363 (1983).

Colorado - Adams v. Richardson, 714 P.2d 921 (Col. App. 1986); McCarty v. Goldstein, 151 Col. 154, 376 P.2d 691 (1962).

Delaware - Dunn v. St. Francis Hospital, 401 A.2d 77 (Del. 1979); Reyes v. Kent General Hospital, 487 A.2d 1142 (Del. 1984).

Florida - Doe v. Shands Teaching Hospital & Clinics, Inc., 614 So.2d 1170 (Fla. App. 1993), cert. den., 626 So.2d 204 (Fla.); Kush v. Lloyd, 616 So.2d 415 (Fla. 1992); Public Health Trust of Dade County v. Menendez, 584 So.2d 567 (Fla. 1991).

Georgia - Craven v. Lowndes County Hospital Authority, 263 Ga. 656, 437 S.E.2d 308 (1993); Hanflik v. Ratchford, 848 F. Supp. 1539 (N.D. Ga. 1994), aff'd, 56 F.3d 1391 (11<sup>th</sup> Cir. 1995).

Idaho - Holmes v. Iwasa, 104 Idaho 179, 657 P.2d 476 (1983); Hawley v. Green, 117 Ida. 498, 788 P.2d 1321 (1990).

Illinois - Anderson v. Wagner, 79 Ill.2d 295, 402 N.E.2d 560 (1979); Mega v. Holy Cross Hospital, 111 Ill. 2d 416, 490 N.E.2d 665 (1986).

Iowa - Koppes v. Pearson, 384 N.W.2d 381 (Iowa 1986); Fitz v. Dolyak, 712 F.2d 330 (8<sup>th</sup> Cir. 1983).

Kansas - Stephens v. Snyder Clinic Ass'n, 230 Kan. 115, 631 P.2d 222 (1981); Wheeler v. Lenski, 658 P.2d 1056 (Kan. App. 1983); Marzolf v. Gilgore, 924 F. Supp. 127 (D. Kan. 1996).

Louisiana - Crier v. Whitecloud, 496 So.2d 305 (La. 1986); Whitnell v. Silverman, 686 So.2d 23 (La. 1996); Montajino v. Canale, 792 F.2d 554 (5<sup>th</sup> Cir. 1986).

Maine - Choroszy v. Tso, 647 A.2d 803 (Maine 1994); Dasha v. Maine Medical Center, 918 F. Supp. 25 (D. Me. 1996).

Maryland - Hill v. Fitzgerald, 304 Md. 689, 501 A.2d 27 (1985).

Minnesota - Willette v. The Mayo Foundation, 458 N.W.2d 120 (Minn. App. 1990); Jewson v. Mayo Clinic, 691 F.2d 405 (8<sup>th</sup> Cir. 1982).

Missouri - Wheeler v. Briggs, 941 S.W.2d 512 (Mo. 1997); Ross v. Kansas City Gen Hospital & Medical Center, 608 S.W.2d 397 (Mo. 1980); Laughlin v. Forgrave, 432 S.W.2d 308 (Mo. 1968); Miguel v. Lehman, 902 S.W.2d 327 (Mo. App. 1995); Green v. Washington University Medical Center, 761 S.W.2d 688 (Mo. App. 1988).

Nebraska - Colton v. Dewey, 212 Neb. 126, 321 N.W.2d 913 (1982); Schendt v. Dewey, 246 Neb. 573, 520 N.W.2d 541 (Neb. 1994).

New Mexico - Armijo v. Tandysh, 98 N.M. 181, 646 P.2d 1245 (App. 1981), cert. quashed, 98 N.M. 336, 648 P.2d 794; cert. denied, 459 U.S. 1016 (1982).

North Carolina - Roberts v. Durham County Hospital Corp., 56 N.C.App. 533, 289 S.E.2d 875 (1982), cert. denied, 307 N.C. App. 465, 298 S.E.2d 384 (1983); Walker v. Santos, 70 N.C. App. 623, 320 S.E.2d 407 (1984); Barwick v. Celotex Corp., 736 F.2d 946 (4<sup>th</sup> Cir. 1984).

Oklahoma - Rosson v. Coburn, 876 P.2d 731 (Oka. App. 1994).

Rhode Island - Dowd v. Rayner, 655 A.2d 679 (R.I. 1995).

South Carolina - Hoffman v. Powell, 298 S.C. 338, 380 S.E.2d 821 (1989); Smith v. Smith, 291 S.C. 420, 354 S.E.2d 36 (1987).

Tennessee - Harrison v. Schrader, 569 S.W.2d 822 (Tenn. 1978); Burris v. Ikard, 798 S.W. 2d 246 (Tenn. App. 1990).

Utah - Allen v. Intermountain Health Care, 635 P.2d 30 (Utah 1981).

Washington - Duffy v. King Chiropractic Clinic, 17 Wash. App. 693, 565 P.2d 435 (1977).

Wisconsin - Mill by Sommer v. Kretz, 191 Wis.2d 574, 531 N.W.2d 93 (1995); Halverson v. Tydrich, 156 Wis.2d 202, 456 N.W.2d 852 (1990).

## NOTES

### EIGHT YEARS AFTER *MILKOVICH*: APPLYING A CONSTITUTIONAL PRIVILEGE FOR OPINIONS UNDER THE WRONG CONSTITUTION

M. ERIC EVERSOLE\*

#### INTRODUCTION

The First Amendment's guarantee of free speech and a free press are fundamental rights of the Constitution.<sup>1</sup> These freedoms allow Americans to voice their concerns and opinions on the operation of government and other issues affecting public interests.<sup>2</sup> They are, as stated by Professor Laurence Tribe, "among the most broadly enjoyed and universally enforced principles of our Constitution—pair of the political bedrock on which the republic was built."<sup>3</sup>

This national commitment to free expression, however, often clashes with the states' interest in providing redress for reputational harms in tort for defamation.<sup>4</sup>

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1. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I.

2. *See, e.g.*, *Milk Wagon Drivers Union v. Meadowmoor Dairies*, 312 U.S. 287, 301-02 (1941) (Black, J., dissenting) (stating that "the freedom to speak and write about public questions is as important to the life our government as is the heart to the human body."); Hon. Robert I. Berdon, *Freedom of the Press and the Connecticut Constitution*, 26 CONN. L. REV. 659, 659 (1994) (freedom of speech "gives us the right to question our government, express our concerns, speak our minds, and even criticize public figures over public issues. . . .").

3. LAURENCE H. TRIBE, *CONSTITUTIONAL CHOICES* 189-90 (1985).

4. Defamation includes the twin torts of libel (written defamatory comments) and slander (spoken defamatory comments). W. PAGE KEETON ET AL., *PROSSER AND KEETON ON TORTS* § 111, at 771 (5th ed. 1984) [hereinafter PROSSER AND KEETON]. Although there are differences between the two under state tort law, the Supreme Court has not distinguished between the two and has referred to them collectively as defamation. This Note will do the same.

All states recognize an action for defamation under their common law. Additionally, many states specifically provide in their constitutions that harm to one's reputation shall be redressed in their courts. *See* ALA. CONST. art. I, § 13; ARK. CONST. art. II, §§ 2, 13; DEL. CONST. art. I, § 9; IDAHO CONST. art. I, § 18; ILL. CONST. art. I, § 12; IND. CONST. art. I, § 12; KAN. CONST. Bill of

Although not specifically enumerated in the Constitution, the Supreme Court has stated on numerous occasions that “[t]he right of a man to the protection of his reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty.”<sup>5</sup> With such lofty values placed on both good name and freedom of expression, it is not surprising that federal and state courts experience difficulty in balancing these rights, especially in distinguishing statements of fact from opinion.

In 1990, the Supreme Court case of *Milkovich v. Lorain Journal Co.*<sup>6</sup> attempted to clarify the enigmatic distinction between non-actionable opinions and actionable assertions of fact. Prior to the decision, most courts provided absolute constitutional protection for statements of opinion based on dicta in *Gertz v. Robert Welch, Inc.*,<sup>7</sup> in which the Court suggested that there were no false ideas under the First Amendment.<sup>8</sup> *Milkovich*, however, rejected the artificial dichotomy between fact and opinion and held existing constitutional protections sufficiently protected opinions. These existing safeguards included the requirements that statements be objectively provable as false and cannot be “reasonably interpreted as stating actual facts.”<sup>9</sup> Unfortunately, in reaching this conclusion, the Court did not establish whether several contextual tests

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Rights, § 18; KY. CONST. Bill of Rights, § 14; LA. CONST. art. I, § 22; ME. CONST. art. I, § 19; MASS. CONST. pt. I, art. XI; MINN. CONST. art I, § 8; MISS. CONST. art. III, § 24; MO. CONST. art. I, § 14; MONT. CONST. art. II, § 16; NEB. CONST. art. I, § 13; N.H. CONST. pt. I, art. XIV; N.C. CONST. art. I, § 18; N.D. CONST. art. I, § 9; OHIO CONST. art. I, § 16; OKLA. CONST. art. II, § 6; OR. CONST. art. I, § 10; PA. CONST. art. I, § 11; R.I. CONST. art. I, § 5; S.D. CONST. art. VI, § 20; TEX. CONST. art. I, § 13; UTAH CONST. art. I, § 11; VT. CONST. ch. I, art. IV; W. VA. CONST. art. III, § 17; WIS. CONST. art. I, § 9. For an extensive discussion of various state constitutional provisions that protect reputation, see *Developments in the Law—The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1398 (1982).

5. *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring). The Court cites this passage often in cases where it limits the perceived scope of First Amendment protections for defamatory speech. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 757-58 (1985); *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 773 (1986).

6. 497 U.S. 1 (1990).

7. 418 U.S. 323 (1974).

8. *Id.* at 339. Although the statement was dictum, many courts and commentators responded to the decision by creating several context-based tests to distinguish fact from opinion. As will be discussed *infra*, most courts employed one of two tests. First, many courts relying on *Ollman v. Evans*, 950 F.2d 970 (D.C. Cir. 1984), used a “totality of circumstances” test which focused on a statement’s context (i.e., surrounding sentences and format) and factual verifiability. See discussion *infra* Part I.C. Other courts found statements to be protected opinion if the underlying facts of the alleged defamatory statement were present, a test which was formulated in the *Restatement (Second) of Torts* § 566 (1977). See discussion *infra* Part I.C.

9. *Id.* at 19-20.

developed by lower courts were still applicable.<sup>10</sup> As a result, judicial interpretations of *Milkovich* vary widely.

A vast majority of courts conclude that *Milkovich*, while focusing on factual verifiability, does not affect the underlying fact/opinion dichotomy; it merely repudiates the terminology.<sup>11</sup> This interpretation wrongly assumes that *Milkovich* absolutely protects subjective assertions or evaluations. Instead, the focus is whether a reasonable reader or listener would interpret the statement as factual in nature. If they could, then a jury should determine whether it is an assertion of fact and whether the plaintiff met his burden. But, this is not to say that critical evaluations are left unprotected. On the contrary, these types of assertions receive constitutional protections under pre-existing constitutional fault requirements. Further, opinions in general can be absolutely protected under each state's common law and constitution.

As a backdrop for this discussion, Part I of this Note will trace the constitutional underpinnings of *Milkovich*, including the development of the fact/opinion dichotomy by lower courts. Part II will examine the holding of *Milkovich* and analyze how lower courts treat opinions after the decision. It will also comment on several distinctions between the analysis required by *Milkovich* and that used prior to the decision. Part III will suggest the application of state constitutional and common law privileges for opinions.

## I. EARLY FIRST AMENDMENT PROTECTIONS AND THE OPINION PRIVILEGE

Traditionally, defamatory remarks did not fall within the protections of the First Amendment.<sup>12</sup> However, beginning in 1964 with *New York Times Co. v. Sullivan*,<sup>13</sup> the Supreme Court placed several constitutional restrictions on state

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10. One commentator criticized *Milkovich* for merely “perpetuat[ing] the uncertainty that currently pervades the opinion privilege.” *The Supreme Court, 1989 Term—Leading Cases*, 104 HARV. L. REV. 129, 219 (1990).

11. See, e.g., Nat Stern, *Defamation, Epistemology, and the Erosion (but Not Destruction) of the Opinion Privilege*, 57 TENN. L. REV. 595, 595 (1990) (*Milkovich* read as a whole does not necessitate a revision of existing contextual approaches); ROBERT D. SACK & SANDRA S. BARON, *LIBEL, SLANDER, AND RELATED PROBLEMS* § 4.2.3.1., at 208-10 (2d ed. 1994) (*Milkovich* does not change the underlying fact/opinion dichotomy); BRUCE W. SANFORD, *LIBEL AND PRIVACY* § 5.3.2 (2d ed. Supp. 1997) (instead of emphasizing the *a priori* classifications, *Milkovich* uses an objectivity and verifiability approach like some of the better reasoned *Ollman* analyses).

12. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573-74 (1942); *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952). Under the common law, a statement was defamatory if it tended “to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.” *RESTATEMENT (SECOND) OF TORTS* § 566 cmt. a (1977). Although generally a speaker of an alleged defamatory statement could prove truth as a defense, liability could not be avoided by demonstrating a lack of fault. *Id.* The tort was essentially one of strict liability.

13. 376 U.S. 254 (1964).

defamation law.<sup>14</sup> These limitations are of two broad types: (1) plaintiffs must prove some level of culpability depending on his private or public status, and (2) plaintiffs must prove falsity if the alleged defamatory speech is of public concern. These restrictions, however, are not wholesale privileges under the Constitution. In each case, the Court balanced the interests of free speech and reputation by closely examining the public or private nature of both the speech and the plaintiff. The more private the speech and plaintiff, the less likely the Court is willing to provide First Amendment protections.

### *A. Culpability Requirements*

In *New York Times*, the Court granted certiorari to decide whether a “public official” plaintiff could successfully claim defamation without proof of culpability.<sup>15</sup> After recognizing a national commitment to “uninhibited, robust, and wide-open” public speech,<sup>16</sup> the Court stated that free speech requires sufficient “breathing space” for the inevitable erroneous statements in public debate.<sup>17</sup> To protect this interest, media defendants are only liable for disseminating false and defamatory information with “actual malice”—that is, with knowledge that the statements were false or with reckless disregard of whether they were false or not.”<sup>18</sup> Three years later, in *Curtis Publishing Co. v. Butts*,<sup>19</sup> the Supreme Court further explored the issue of culpability when it addressed whether public figures needed to show actual malice.<sup>20</sup> Like public

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14. Many of the Court’s decisions concerning First Amendment restrictions on defamation law hint that there may be a distinction between media and non-media defendants. *See, e.g.*, *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776-77 (1986) (the majority opinion stated that private plaintiffs must show falsity when media defendant are involved). Although this position has its critics, *see Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 783-84 (1985) (Brennan, J., dissenting) (at least six Justices agree that there is no media/non-media distinction for the purposes of First Amendment protections), this Note will attempt to limit its focus to media defendants.

15. The public official plaintiff in this case was the Commissioner of the Police Department in Montgomery, Alabama. *New York Times Co.*, 376 U.S. at 258. Although the Court has not specifically defined “public official,” the term is defined fairly broad to include at the very least “those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.” *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966).

16. *New York Times Co.*, 376 U.S. at 270.

17. *Id.* at 271-72 (citations omitted).

18. *Id.* at 279-80.

19. 388 U.S. 130 (1967).

20. Public figure was defined as a person “intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.” *Id.* at 164 (Warren, J., concurring). In *Curtis Publishing*, a football coach at a major university was a public figure for the purposes of defamation law. In subsequent cases, however, the Court added the element that plaintiffs must “voluntarily expose[] themselves to increased risk of injury from

officials, public figures enter the public arena on their own volition. They command a substantial amount of public interest, and because of their status, they can correct falsehoods through other media sources.<sup>21</sup> Finding no rational distinction between public figures and officials, the Court extended the actual malice and proof of falsity requirements to public figures.

In *Gertz v. Robert Welch, Inc.*,<sup>22</sup> however, the Court made clear that not all speech was as deserving of First Amendment protection.<sup>23</sup> In *Gertz*, the Court refused to extend the actual malice standard to private plaintiffs.<sup>24</sup> Unlike private plaintiffs, public figures and officials “voluntarily expose themselves to increased risk of injury from defamatory falsehood[s].”<sup>25</sup> Further, they “enjoy significantly greater access to channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals enjoy.”<sup>26</sup> The Court concluded that the appropriate balance required private plaintiffs only to prove some level of culpability to be determined by each state.<sup>27</sup> Nonetheless, it recognized that if private plaintiffs claim punitive damages, they must prove actual malice in order to prevent excessive damage awards caused by negligent conduct.<sup>28</sup>

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defamatory falsehood” by assuming a “public” position. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345 (1974).

21. *Butts*, 388 U.S. at 154-55 (quotations and citations omitted).

22. 418 U.S. 323 (1974).

23. Prior to *Gertz*, many lower courts extended the actual malice requirements to private plaintiffs based on dictum in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971). Justice Brennan, writing for a plurality in *Rosenbloom*, stated:

If a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual does not voluntarily choose to become involved. . . . We honor the commitment to robust debate on public issues, which is embodied in the First Amendment, by extending constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous.

*Id.* at 43-44 (citations and quotations omitted).

24. The term private figure has not been specifically defined by the Court. However, in contrast to public figures, the distinction between the two may be that private figures do not voluntarily expose themselves to the public. *See Gertz*, 418 U.S. at 345. Additionally, private figures do not have the means to correct defamatory falsehoods. *Id.* For a thorough discussion of the many distinctions between private and public plaintiffs, and their relative burden of proof in defamation cases, see SACK & BARON, *supra* note 11, at 248-73; SANFORD, *supra* note 11, § 7.

25. *Gertz*, 418 U.S. at 344-45.

26. *Id.* at 344 (footnote omitted).

27. *Id.* at 347.

28. *Id.* at 350.

### *B. Falsity Requirements*

Beyond the varying culpability requirements, cases interpreting the First Amendment also require plaintiffs to prove falsity. For public figures and officials, proof of falsity is required implicitly by *New York Times* and *Butts*; otherwise, how could one prove reckless disregard of the truth. It was not until 1986, in *Philadelphia Newspapers, Inc. v. Hepps*,<sup>29</sup> that the Court addressed whether private plaintiffs also needed to prove falsity. It answered the question affirmatively.

In *Hepps*, the defendant published stories alleging that the private plaintiff Hepps utilized ties with organized crime to influence state legislators. The trial court instructed the jury that the statements were presumptively false, and based on this instruction, the jury found the paper liable. In reversing, the Supreme Court stated that "the common-law presumption that defamatory speech is false cannot stand when a plaintiff seeks damages against a media defendant for speech of public concern."<sup>30</sup> Because the speech concerned state legislative processes, it clearly was of public concern.<sup>31</sup> Thus, the case was remanded so that Hepps could attempt to prove falsity.<sup>32</sup>

Another type of falsity protection is for statements that cannot reasonably be interpreted as stating actual facts.<sup>33</sup> In *Greenbelt Cooperative Publishing Ass'n v. Bresler*,<sup>34</sup> the public figure plaintiff engaged in strong-arm negotiating tactics with local city councilmen for zoning variances. The newspaper accurately reported the substantive details of various city council meetings and stated that many citizens described his proposals as "blackmail." Bresler then successfully sued for libel in state court because he was not engaging in the criminal activity of blackmail. The Supreme Court reversed because "even the most careless reader must have perceived that the word [blackmail] was no more than hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable."<sup>35</sup>

In *Old Dominion Branch No. 496, National Association of Letter Carriers*

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29. 475 U.S. 767 (1986).

30. *Id.* at 777.

31. There has been considerable debate as to what constitutes speech of public concern. For a detailed examination of modern-day components of this subject, see Robert C. Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601, 667-79 (1990).

32. *Id.* at 776.

33. The Supreme Court never drew a distinction in *Hepps* between its falsity analysis and the reasonable interpretation analysis of the forthcoming cases. Nonetheless, the distinction between the two types of falsity was drawn in *Milkovich v. Lorain Journal Co.* 497 U.S. 1, 20 (1990). Therefore, this Note will analyze the two protections as distinct types of falsity requirements.

34. 398 U.S. 6 (1970).

35. *Id.* at 14.

v. *Austin*,<sup>36</sup> the Court held that a newsletter containing the names of several non-union employees under a “List of Scabs,” was not actionable. In sum, the newsletter defined “scab,” as a “a traitor to his God, his country, his family and his class.”<sup>37</sup> Like *Greenbelt*, the use of “traitor” did not impute criminal activity. It was nothing more than “rhetorical hyperbole, a lusty and imaginative expression of the contempt felt by union members towards those who refuse to join.”<sup>38</sup> Because no one would reasonably believe that non-union workers were being charged with treason, the Court held that it was constitutionally protected free speech.

Finally, in the 1988 *Hustler Magazine, Inc. v. Falwell*<sup>39</sup> decision, the Court extended the First Amendment privilege to parody. Hustler printed a parody cartoon depicting the public figure Reverend Jerry Falwell as saying that his “first time” was a drunken incestuous rendezvous with his mother. In finding for Hustler, the Court reiterated the fundamental principle that public figures voluntarily subject themselves to “vehement, caustic, and sometimes unpleasantly sharp attacks.”<sup>40</sup> Even though this cartoon lacked much social value, toleration of such speech was necessary to prevent an undue chill on First Amendment rights.<sup>41</sup>

### C. Full Constitutional Protection for Opinions

Despite being limited to the requisite fault for private plaintiffs, many lower courts interpreted *Gertz* as providing absolute immunity for statements of opinion.<sup>42</sup> In dicta, Justice Powell writing for the majority stated:

We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. . . .<sup>43</sup>

The notion that there was “no such thing as a false idea” caused many lower

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36. 418 U.S. 264 (1974).

37. *Id.* at 268.

38. *Id.* at 285-86.

39. 485 U.S. 46 (1988).

40. *Id.* at 51 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

41. *Id.* at 56 (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 (1985)).

42. Judge Friendly of the Second Circuit Court of Appeals observed that this passage “has become the opening salvo in all arguments for protection from defamation actions on the ground of opinion, even though the case did not remotely concern the question.” *Cianci v. New Times Publ’g Co.*, 639 F.2d 54, 61 (2d Cir. 1980). *See also SACK & BARON, supra* note 11, § 4.2.3.1., at 208-10 & nn.34-35 (By 1990, every federal circuit and courts in at least thirty-six states and the District of Columbia held that *Gertz* required constitutional protection for opinions.).

43. *Gertz*, 418 U.S. at 339-40.

courts to create a constitutional privilege for opinions because opinions by their nature were mere ideas or subjective viewpoints. But, the opinion doctrine also included statements which could not be interpreted as stating actual facts.<sup>44</sup> Of the many tests used for distinguishing non-actionable opinions from actionable statements of fact, two tests became widely popular: the “pure” opinion analysis under the *Restatement (Second) of Torts* § 566 and the four-factor “totality of circumstances” test of *Ollman v. Evans*,<sup>45</sup> or some combination of the two.

One popular opinion privilege test was the *Restatement (Second) of Torts* § 566.<sup>46</sup> Under the ALI’s second *Restatement*, opinions could be “pure” or “mixed.” A pure opinion occurs when the speaker either states the facts upon which his viewpoint is based or the facts are otherwise known to all parties involved in the communication.<sup>47</sup> On the other hand, a mixed opinion is based on neither disclosed facts nor facts assumed to exist by the parties.<sup>48</sup> The distinction between pure and mixed opinion has constitutional significance under *Gertz* because a pure opinion “is not itself sufficient for an action of defamation, no matter how unjustified and unreasonable the opinion may be or how

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44. On the same day it decided *Gertz*, the Court also handed down *National Ass’n of Letter Carriers v. Austin*, 418 U.S. 264 (1974). In *Letter Carriers*, the Court concluded that the word “scab” was merely rhetorical hyperbole. *Id.* at 286. In reaching this conclusion, the Court quoted the “no false idea” language of *Gertz*. Read together, *Gertz* and *Letter Carriers* appear to create an absolute constitutional privilege for a wide-class of statements which are not provable as true or false, either because of their interpretive nature or because of their ambiguity.

45. 750 F.2d 970 (D.C. Cir. 1984).

46. See *Dunn v. Gannett New York Newspapers, Inc.*, 833 F.2d 446 (3d Cir. 1987) (statements alleging that a mayor had embezzled funds were non-actionable “pure” opinion because the underlying facts were disclosed); *Falls v. Sporting News Publ’g Co.*, 834 F.2d 611 (6th Cir. 1987) (statements that implied undisclosed defamatory facts were actionable); *National Ass’n of Gov’t Employees, Inc. v. Central Broad. Corp.*, 396 N.E.2d 996 (Mass. 1979) (being called “communist” was protected because the underlying facts for the opinion were disclosed), *cert. denied*, 446 U.S. 935 (1980). See also Gregory A. Moore, Note, *Yancy v. Hamilton: Kentucky Adopts the Restatement Test in Fact-Opinion Libel Law*, 17 N. KY. L. REV. 599 (1990) (discussing the state’s acceptance of the *Restatement* and its benefits over the *Ollman* test).

47. RESTATEMENT (SECOND) OF TORTS § 566, cmt. b (1977). As an example of “pure” opinion, the ALI states:

A writes to B about his neighbor C: ‘He moved in six months ago. He works downtown, and I have seen him during that time only twice, in his backyard around 5:30 seated in a deck chair with a portable radio listening to a news broadcast, and with a drink in his hand. I think he must be an alcoholic.

This is an example of pure opinion because the author discloses the underlying facts of his statement, which allows B to make his own conclusion as to C’s drinking habit. *Id.* § 566, cmt. c, illus. 4 (1977).

48. *Id.* The ALI illustrates “mixed” opinion by stating that if “A writes to B about his neighbor C” and states, “I think he must be an alcoholic,” then this is a mixed opinion because A does not disclose his factual predicate for making such a statement, and B must assume that A has facts to verify the statement. *Id.* § 566, cmt. c, illus. 3 (1977).

derogatory it is.”<sup>49</sup> However, if the opinion “implies the allegation of undisclosed defamatory facts as the basis for the opinion,” then it is subject to an action of defamation.<sup>50</sup> In other words, in order for an opinion to be defamatory under the First Amendment, it must fail to disclose its underlying facts or state false facts as the premise for the author’s opinion.

Another popular fact/opinion test was the “totality of circumstances” test created by *Ollman v. Evans*.<sup>51</sup> In *Ollman*, plaintiff Bertel Ollman, a professor of political science at New York University, sued defendants Rowland Evans and Robert Novak for defamation when they published several opinion-editorials in the *Washington Post*. In substance, these columns attacked his communist background and questioned the propriety of him running a political science department at a major university.<sup>52</sup>

To analyze whether the statements were constitutionally protected opinion, the *Ollman* court determined that four factors should be reviewed: (1) “the common usage or meaning of the specific language of the challenged statement itself”—whether the statement has a common understanding or is ambiguous or uncertain;<sup>53</sup> (2) “the statement’s verifiability”—whether the statement can be provable as true or false;<sup>54</sup> (3) “the full context of the statement—the entire article or column, for example”—whether the context of the article would suggest that the statement is an opinion;<sup>55</sup> and (4) “the broader context or setting in which the statement appears”—whether the type of magazine, paper, or television broadcast would cause the reader to deem the alleged defamatory comment as a statement of opinion.<sup>56</sup>

The *Ollman* court first analyzed the context of the articles. It noted that the articles were in an opinion-editorial format. Further, the defendants never alleged to have “first-hand knowledge” that Ollman was not a scholar.<sup>57</sup> In fact, the words within the text of the articles suggested that the defendants considered

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49. RESTATEMENT (SECOND) OF TORTS § 566, cmt. c (1977).

50. *Id.* § 566.

51. 750 F.2d 970 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985). For courts that later applied *Ollman*’s “totality of circumstances test,” see *Potomac Valve & Fitting, Inc. v. Crawford Fitting Co.*, 829 F.2d 1280 (4th Cir. 1987); *Brown & Williamson Tobacco Corp. v. Jacobson*, 827 F.2d 1119 (7th Cir. 1987), *cert. denied sub nom. CBS v. Brown & Williamson Tobacco Corp.*, 485 U.S. 993 (1988); *Information Control Corp. v. Genesis One Computer Corp.*, 611 F.2d 781 (9th Cir. 1980).

52. Specifically, the articles stated that Ollman was a Marxist scholar and “political activist” with “no academic standing.” Furthermore, they said that he would use his “classroom as an instrument for preparing what he calls ‘the revolution.’” *Ollman*, 750 F.2d at 971.

53. *Id.* at 979 (citing *Buckley v. Littell*, 539 F.2d 882, 895 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977)).

54. *Id.* (citing *Hotchner v. Castillo-Puche*, 551 F.2d 910, 913 (2d Cir.), *cert. denied*, 443 U.S. 834 (1977)).

55. *Id.* (citing *Greenbelt Coop. Publ’g Ass’n v. Bresler*, 398 U.S. 6 (1970)).

56. *Id.* (citing *National Ass’n of Letter Carriers v. Austin*, 418 U.S. 264 (1974)).

57. *Id.* at 983.

Ollman a scholar, just not the right person to chair a political science department at a major university.<sup>58</sup> The court concluded that these factors would lead a reasonable reader to believe the writers were only espousing their opinions.<sup>59</sup> Next, the court examined whether the articles were sufficiently factual to overcome their status as opinion. The accusation of a crime was one example of a statement “with a well-defined meaning,” which would give “rise to clear factual implications.”<sup>60</sup> Such well-defined terms are subject to defamation regardless of their form.<sup>61</sup> Although the majority found “troublesome” the statement that Ollman had “no status within the profession,”<sup>62</sup> it nevertheless held that the statements were non-actionable opinions because the “confluence of factors” outweighed the factual implications of the statement.<sup>63</sup>

## II. *MILKOVICH: DEATH OF THE OPINION PRIVILEGE?*

By 1990, a vast majority of state and federal courts recognized an absolute constitutional privilege for opinions.<sup>64</sup> However, some courts and commentators questioned its validity and suggested abandoning the privilege.<sup>65</sup> In fact, as early as 1982, two Supreme Court Justices stated that lower courts were misconstruing the *Gertz* dictum.<sup>66</sup> The Court addressed this issue in *Milkovich v. Lorain Journal Co.*<sup>67</sup>

### *A. The Majority’s Decision and Justice Brennan’s Dissent*

In 1974, plaintiff Milkovich and his wrestling team were involved in a fight with a rival high school, Maple Heights. The Ohio High School Athletic

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58. *Id.*

59. *Id.* at 982.

60. *Id.* at 980 (quoting *Cianci v. New Times Publ’g Co.*, 639 F.2d 54, 63 (2d Cir. 1980)).

61. *Id.* at 985.

62. *Id.* at 989.

63. *Id.* at 990.

64. See SACK & BARON, *supra* note 11, § 4.2.3.1., at 208-10 & nn.34-35 (stating that by 1990, every federal circuit court and courts in at least thirty-six states and the District of Columbia held that statements of opinion were constitutionally protected because of *Gertz*).

65. See Marc A. Franklin & Daniel J. Bussel, *The Plaintiff’s Burden in Defamation: Awareness and Falsity*, 25 WM. & MARY L. REV. 825, 870-75 (1984) (stating that the dichotomy between facts and opinion was unnecessary); Alfred Hill, *Defamation and Privacy Under the First Amendment*, COLUM. L. REV. 1205, 1239 (1976) (the Restatement’s formulation of the opinion privilege based on dictum in *Gertz* ignores the rich common law history of fair comments).

66. In *Miskovsky v. Oklahoma Publishing Co.*, 459 U.S. 923 (1982), Justices Rehnquist and White dissented from the Court’s denial of certiorari on the basis that the Oklahoma Supreme Court had mistakenly relied on the dictum in *Gertz* for a constitutional opinion privilege. *Id.* at 924-25. See also Justice Rehnquist and Chief Justice Burger’s dissent from the Court’s denial of certiorari in *Ollman v. Evans*, 471 U.S. 1127 (1985) (stating that “no false idea” language of *Gertz* was dictum and was not a constitutional basis for upholding summary judgment).

67. 497 U.S. 1 (1990).

Association (OHSAA) conducted a hearing in which Milkovich testified, and his team received probation. Several parents then contested the ruling in state court, and Milkovich again testified about the brawl. The trial court found that the OHSAA hearing violated due process and overturned the order of probation.<sup>68</sup> The next day defendant Diadiun wrote an opinion-editorial article in the sports section of a local newspaper concerning the court's ruling. Under the heading "Maple beat the law with the 'big lie,'" the article alleged that Milkovich lied at trial in order for the court to reverse the OHSAA's ruling.<sup>69</sup> After Milkovich initiated a defamation suit in the Ohio state courts, the Ohio Supreme Court held in 1984 that the article was a defamatory assertion of fact because Milkovich was neither a "public official" nor a "public figure" under *New York Times* and *Butts*.<sup>70</sup> In 1989, the case went back to the Ohio Supreme Court, and this time, it found the speech to be constitutionally protected opinion under *Ollman* and *Gertz* because the opinion-editorial context of the article was sufficient to indicate "'to even the most gullible reader that the article was, in fact, opinion.'"<sup>71</sup> The Supreme Court granted certiorari in 1990 and reversed in a 7-2 decision.

The Court's analysis began by reviewing *New York Times* and its progeny. After noting that many lower courts provided absolute protection for opinions under *Gertz*, it flatly rejected this proposition by stating, "'Gertz was [not] intended to create a wholesale defamation exemption for anything that might be labeled 'opinion'" because it would "ignore the fact that expressions of 'opinion' may often imply an assertion of objective fact."<sup>72</sup> Instead, opinions received sufficient protection under existing constitutional safeguards.<sup>73</sup> First and foremost, the opinions are protected under *Philadelphia Newspapers, Inc. v. Hepps*, which requires a private plaintiff involved in matters of public concern to prove falsity.<sup>74</sup> This ensures that media defendants, who write opinions on public issues, will not be put in the impossible position of proving an opinion which is objectively undeterminable.<sup>75</sup> Second, the cases of *Greenbelt, Letter*

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68. *Id.* at 4.

69. Specifically, the article stated: "'If you're successful enough, and powerful enough, and can sound sincere enough, you stand an excellent chance of making the lie stand up, regardless of what really happened.'" "'The teachers responsible were mainly head Maple wrestling coach, Mike Milkovich, and former superintendent of schools H. Donald Scott.'" "'Anyone who attended the meet. . . knows in his heart that Milkovich and Scott lied at the hearing after each having given his solemn oath to tell the truth.'" *Id.* at 4-5 (quoting *Milkovich v. News-Herald*, 545 N.E.2d 1320, 1321-22 (Ohio Ct. App. 1989)).

70. *Id.* at 8 (quoting an earlier case in the litigation, *Milkovich v. News-Herald*, 473 N.E.2d 1191, 1193-97 (Ohio 1984)). For a discussion of *New York Times* and *Butts*, see discussion *supra* Part I.A.

71. *Milkovich*, 497 U.S. at 9.

72. *Id.* at 18.

73. *Id.* at 19.

74. *Id.* at 19-20.

75. *Id.* at 20.

*Carriers*, and *Hustler* protect those statements that cannot be “reasonably interpreted as stating actual facts about an individual.”<sup>76</sup> The third level of constitutional protection is the culpability requirements of *New York Times*, *Butts*, and *Gertz*.<sup>77</sup> Finally, *Bose Corp. v. Consumers Union of United States, Inc.*<sup>78</sup> requires an appellate court to make “an independent examination of the whole record.”<sup>79</sup>

In analyzing the facts of *Milkovich*, the majority wrote that the dispositive question was “whether a reasonable fact finder could conclude that the statements in the Diadiun columns imply an assertion that the petitioner Milkovich perjured himself in a judicial proceeding.”<sup>80</sup> The Court answered this question affirmatively. The impact of the article suggested that Milkovich lied under oath, which was sufficiently factual to be proven true or false.<sup>81</sup> Further, the “general tenor” of the article did not negate this impression because the language was not the “loose, figurative” speech of *Bresler*, *Letter Carriers*, or *Falwell*.<sup>82</sup> Without further justification, it noted that the decision held true the balance between First Amendment rights and society’s “strong interest in preventing and redressing attacks upon reputation.”<sup>83</sup> The Court remanded the case so that Milkovich could prove the falsity and culpability as set forth in the opinion.<sup>84</sup>

In the dissent, Justices Brennan and Marshall agreed that there was no “opinion privilege wholly in addition to the protections we [the Court] have already found to be guaranteed by the First Amendment.”<sup>85</sup> However, in analyzing whether the articles were sufficiently factual to be defamatory, Justice Brennan thought that courts could rely on the “same indicia” used prior to *Milkovich*. These indicia included “the type of language used, the meaning of the statement in context, whether the statement is verifiable, and the broader social circumstances in which the statement was made.”<sup>86</sup>

The dissent argued that Diadiun’s statements were merely “conjecture,” which is a hypothesis or speculation as to what occurred in an event. Like rhetorical hyperbole, it is factually incapable of being proven true or false.<sup>87</sup> The dissent reasoned that the article never asserted first-hand knowledge of Milkovich’s testimony at trial; it merely speculated as to what must have

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76. *Id.* (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988)).

77. *Id.* at 20.

78. 466 U.S. 485 (1984).

79. *Milkovich*, 497 U.S. at 21 (quoting *Bose Corp.*, 466 U.S. at 499).

80. *Id.*

81. *Id.* (citations omitted).

82. *Id.*

83. *Id.* at 22-23 (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966)).

84. *Id.* at 23.

85. *Id.* at 23-24.

86. *Id.* at 24 (citing *Ollman v. Evans*, 750 F.2d 970 (1984)).

87. *Id.* at 28 n.5.

occurred in order for Milkovich to win.<sup>88</sup> Further, the article's opinion-editorial format would alert a reasonable reader that the column was merely conjecture or opinion.<sup>89</sup> These factors outweighed any factual inference made by the articles.

### *B. The Application of Milkovich by Lower Courts: A Return to the Status Quo*

The *Milkovich* decision is unremarkable and its holding is quite clear: in analyzing First Amendment limitations on defamation law, the Court reaffirmed all of its pre-existing precedent, less one opinion privilege created by lower courts. These courts, however, seem reluctant to abandon pre-*Milkovich* fact-opinion analysis. Indeed, it appears that most courts accept Justice Brennan's position that the same contextual indicia are applicable.<sup>90</sup>

Many post-*Milkovich* cases continue to apply a contextual analysis reminiscent of *Ollman v. Evans* and the second *Restatement*, or some combination of the two. For example, in *NBC Subsidiary (KCNC-TV), Inc. v. Living Will Center*,<sup>91</sup> the Colorado Supreme Court held that *Milkovich* did not change the need for "fact vs. opinion" analysis.<sup>92</sup> In *KCNC-TV*, the television defendant aired a newscast claiming that the plaintiff's product was a "scam" and that purchasers of the product "were being taken."<sup>93</sup> The court wrote, "in determining whether a statement is actionable, a court must examine the phrasing of the statement, the context in which it appears, the medium through which it is disseminated, the circumstances surrounding its publication, and a determination of whether the statement implies the existence of undisclosed facts which support it."<sup>94</sup> Under this analysis, the court first noted that the broadcaster simply expressed his viewpoint on the worth of the product.<sup>95</sup> Further, because the newscast was "based on facts disclosed to the viewer," the viewers "were free to evaluate Marsh's [defendant's] views, and were free to form [their own] judgment."<sup>96</sup> The court reversed the appellate court and reinstated the trial court's summary judgment in favor of the defendant.

In *Phantom Touring, Inc. v. Affiliated Publications*,<sup>97</sup> the First Circuit addressed the constitutional protections for theater reviews that disclosed their

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88. *Id.* at 28-30.

89. *Id.* (quoting *Ollman*, 750 F.2d at 986).

90. For an in depth discussion of different and diverse applications of *Milkovich*, see Kathryn Dix Sowle, *A Matter of Opinion: Milkovich Four Years Later*, 3 WM. & MARY BILL OF RIGHTS J. 467, 498-552 (1994) (concludes that there are eight different applications of *Milkovich* by the lower courts).

91. 879 P.2d 6 (Colo. 1994).

92. *Id.* at 10-11.

93. *Id.* at 7-8.

94. *Id.* at 11 (quoting *Milkovich*, 497 U.S. at 20).

95. *Id.* at 11-12.

96. *Id.* at 12.

97. 953 F.2d 724 (1st Cir.), *cert. denied*, 504 U.S. 974 (1992).

underlying facts. In *Phantom Touring*, plaintiff produced a version of “Phantom of the Opera” that was not the famous Andrew Lloyd-Webber production. The *Boston Globe* wrote in its theater review that ticket buyers should be wary of the “Fake Phantom,” and that the show was a “rip-off, a fraud, a scandal, a snake-oil job.” In examining these statements, the First Circuit determined that *Milkovich*:

unquestionably excludes from defamation liability not only statements of rhetorical hyperbole—the type of speech at issue in the *Bresler-Letter Carriers-Falwell* cases—but also statements clearly recognizable as pure opinion because their factual premises are revealed. Both types of assertions have an identical impact on the readers—neither reasonably appearing factual—and hence are protected equally under the principle espoused in *Milkovich*.<sup>98</sup>

The court determined the article’s status as a “theater column” and its “vituperative language” were sufficient to allow the reasonable reader to conclude that the reviews were non-factual.

In another post-*Milkovich* case, *Partington v. Bugliosi*,<sup>99</sup> the Ninth Circuit examined whether the plaintiff’s book defamed an attorney by implying that he was incompetent.<sup>100</sup> As a threshold matter, the court stated that *Milkovich* required courts to determine “whether a reasonable factfinder could conclude the contested statement implies an assertion of objective fact.”<sup>101</sup> This determination could be made by analyzing “the work as a whole, the specific context in which the statements were made, and the statements themselves. . . .”<sup>102</sup> It upheld summary judgment for the defendant because “lawyers who write popular books, and particularly trial lawyers, are not known for their modesty; one would generally expect such authors to have a higher opinion of their performance than of the professional abilities exhibited by other counsel.”<sup>103</sup>

Although a majority of courts use contextual analysis for determining falsity, some courts focus strictly on factual verifiability—that is, whether the statement, taken literally, can be proven true or false. For example, in *Unelko Corp. v. Rooney*,<sup>104</sup> the Ninth Circuit found actionable Andy Rooney’s statement that plaintiff’s product “Rain-X” did not work.<sup>105</sup> In reaching this conclusion, the court determined that *Milkovich* “effectively overruled” the opinion privilege and shifted the focus to factual verifiability.<sup>106</sup> Under this standard, Rooney’s statement, “it didn’t work,” was sufficiently factual to be proven true or false

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98. *Id.* at 729.

99. 56 F.3d 1147 (9th Cir. 1994).

100. *Id.* at 1150.

101. *Id.* at 1153 (citing *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1053 (9th Cir. 1990)) (citations omitted).

102. *Id.*

103. *Id.* at 1154.

104. 912 F.2d 1049 (9th Cir. 1990).

105. *Id.* at 1050-51.

106. *Id.* at 1053.

because “[w]hether Rain-X repels rain, facilitates window cleaning, and increases visibility are all capable of being proved true or false.”<sup>107</sup> Further, Rooney’s comment is not like the satirical account of “a drunken incestuous rendezvous [between plaintiff and] and his mother,” like that exhibited in *Falwell*.<sup>108</sup> Nonetheless, it upheld the trial court’s summary judgment because Unelko failed to prove falsity under *Hepps*.

In another post-*Milkovich* case, *Kolegas v. Heftel Broadcasting Corp.*,<sup>109</sup> the Supreme Court of Illinois took the view that the *Milkovich* test “is a restrictive one,” and only protects those statements that cannot be objectively proven true or false. Kolegas, a promoter and producer of a classic cartoon festival for charity, called the defendant’s radio station and spoke with two disc jockeys while they were on the air. During the conversation, one of the disc jockeys stated that Kolegas was “scamming” them, that his business was “not for real,” and that “there was no such show as the classic cartoon festival.”<sup>110</sup> The court found that statements to be sufficiently factual to be proved true or false, even though the defendants testified they were only joking.<sup>111</sup> The question of whether the audience understood their comments as jokes was a triable issue of fact.<sup>112</sup>

Finally, in *Gill v. Hughes*,<sup>113</sup> an appellate court in California held that an assertion that a physician was incompetent could be actionable because it “implies a knowledge of facts which lead to this conclusion and further is susceptible of being proved true or false.”<sup>114</sup> However, because the truth of the statement had been determined in a separate proceeding, the defendant’s verdict was affirmed.<sup>115</sup>

Some courts, in applying *Milkovich*, have used a questionable construction in analyzing the scope of constitutional protections. For example, in *Spence v. Flynt*,<sup>116</sup> the plaintiff Spence represented Andrea Dworkin, a well-known activist for the National Organization of Women, in another lawsuit against Larry Flynt. Spence initiated his own suit against *Hustler* after it named him “Asshole of the Month,” and stated, in part, that attorneys like him are “shameless shitholes (whose main allegiance is to money) [and] are eager to sell out their personal values, truth, justice and our hard-won freedoms for a chance to fatten their wallets.”<sup>117</sup>

After briefly citing *Milkovich*, the court first concluded that whether Spence sold out his personal values for a large fee may be a false statement of fact

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107. *Id.* at 1055.

108. *Id.* (quoting *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 48 (1988)).

109. 607 N.E.2d 201 (Ill. 1992).

110. *Id.* at 205.

111. *Id.* at 208.

112. *Id.* at 209.

113. 278 Cal. Rptr. 306 (Ct. App. 1991).

114. *Id.* at 311.

115. *Id.*

116. 816 P.2d 771 (Wyo. 1991), *cert. denied*, 503 U.S. 984 (1992).

117. *Id.* at 773.

because Spence may be able to prove that he stands to gain nothing personally.<sup>118</sup> Further, the *Hustler Magazine, Inc. v. Falwell* decision, which allowed First Amendment protections for “satirical” and outrageous humor, was not dispositive because Spence was not a public figure.<sup>119</sup> Thus, it concluded that the statements were actionable under *Chaplinsky v. New Hampshire*<sup>120</sup> because of their “grossly defamatory” nature.<sup>121</sup>

In another interesting case, *Moldea v. New York Times*,<sup>122</sup> the Appellate Court for the District of Columbia examined a book review for possible defamation. In this case, the defendant *New York Times*, in one of its book reviews, stated that the plaintiff author’s work was “sloppy journalism” and contained “warmed over” material. In analyzing the case, the court applied a very strict *Milkovich* analysis by first looking at the alleged defamatory statements, which they thought that “sloppy journalism” was sufficiently factual to be proven true or false. Thereafter, the court determined that none of the existing constitutional protections—*Bresler-Letter Carriers-Falwell*—were applicable. Therefore, the review was found actionable.

However, upon rehearing in *Moldea II*, Judge Edwards admitted that he erred by not considering the broader context of the book review.<sup>123</sup> The context of a book review suggests to the average reader that statements therein are nothing more than the author’s opinion.<sup>124</sup> But, the court also said that not all book reviews were protected. They are protected only if the author’s statements are a “supportable interpretation” of the disclosed facts.<sup>125</sup>

### C. A Critical Analysis of Post-Milkovich Decisions

To understand the effects of *Milkovich* on First Amendment analysis of defamation, the decision must be placed within the backdrop of Supreme Court jurisprudence limiting state defamation law. In all of the cases decided by the Court, it struck a balance between the constitutional interest in free speech and the state interest in reputation by creating different standards of protection for private/public plaintiffs and public or private speech. It also protects certain classes of speech which are not reasonably interpretable as stating actual facts. These protections, however, are limited so that states can adequately protect

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118. *Id.* at 776.

119. *Id.* at 774-76.

120. 315 U.S. 568 (1942).

121. 816 P.2d at 780 (quoting *Chaplinsky*, 315 U.S. at 571-72, for the proposition that grossly defamatory statements are actionable because they are of “such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”).

122. 15 F.3d 1137 (D.C. Cir.) [hereinafter *Moldea I*], modified on rehearing, 22 F.3d 310 (D.C. Cir.) [hereinafter *Moldea II*], cert. denied, 513 U.S. 875 (1994).

123. *Moldea II*, 22 F.3d at 313.

124. *Id.* at 317.

125. *Id.* at 313.

reputation through their common law and constitutions.

The Court explicitly continued this trend in *Milkovich* by rejecting a constitutional privilege for opinions and reaffirming all of its past precedents. It made clear that the heart of constitutional inquiries into falsity requires defamatory statements to "contain a provably false factual connotation,"<sup>126</sup> which requires the statement to be objectively verifiable—i.e., whether the statement is capable of being proven false. It illustrated this point by comparing the assertion, "In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin," with the assertion, "Mayor Jones is a liar."<sup>127</sup> Unlike the former statement, which is not actionable, whether the mayor lied is capable of objective proof, and thus, is actionable.<sup>128</sup> Likewise, the Court stressed in its conclusion that the article was actionable because whether Milkovich "lied in this instance can be made on a *core of objective evidence*."<sup>129</sup> Thus, the factual verifiability prong necessarily makes two inquiries: (1) whether the allegedly defamatory statement is of the *type* that can be proven as false—that is, a meaning or common usage which lends itself to proof of falsity; and (2) whether the statement is *objectively provable* as false by way of evidence presented by the plaintiff.

The second prong of *Milkovich* requires allegedly defamatory statements to be reasonably interpretable as stating actual facts under *Greenbelt Cooperative Publishing Association v. Bresler*,<sup>130</sup> *National Association of Letter Carriers v. Austin*,<sup>131</sup> and *Hustler Magazine, Inc. v. Falwell*.<sup>132</sup> These cases protect hyperbole, epithets, and other invective communications by analyzing the statement's context—i.e., where the statement was said, its format, and other surrounding circumstances. In sum, the question is whether the statement can be construed literally by a reasonable listener or reader.<sup>133</sup>

These two prongs taken together are quite similar to the *Ollman* analysis. Like *Ollman*'s "totality of circumstances test,"<sup>134</sup> *Milkovich* requires courts to look at factual verifiability and context. Indeed, as stated by Justice Brennan's dissent, the "same indicia" are applicable in post-*Milkovich* cases. It should be recognized, however, the shift to factual verifiability substantially changes the outcome of the analysis in several respects and also leaves unanswered several interesting questions.

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126. *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990).

127. *Id.* at 20 (citations omitted).

128. *Id.*

129. *Id.* at 21 (emphasis added). The core of objective evidence in this case could be gathered by comparing Milkovich's testimony during the OHSAA proceeding and his testimony at the due process hearing in the trial court. *Id.* at 21-22.

130. 398 U.S. 6 (1970).

131. 418 U.S. 264 (1974).

132. 485 U.S. 46 (1988).

133. Jerry J. Phillips, *Opinion and Defamation: The Camel in the Tent*, 57 TENN. L. REV. 647, 660 (1990).

134. See *supra* notes 51-63 and accompanying text.

First, subjective assertions or evaluations are not granted wholesale immunity under the Constitution, even if the speaker states the underlying facts for his viewpoint. Contrary to Justice Brennan's dissent and the *Restatement (Second) of Torts* § 566, the relevant inquiry under *Milkovich* is not whether the author believes what he is saying, but instead focuses solely on whether a reasonable reader could interpret the statement as factual in nature.<sup>135</sup> The majority makes this explicitly clear:

If a speaker says, "In my opinion John Jones is a liar," he implies a knowledge of facts which lead to the conclusion that Jones told an untruth. *Even if the speaker states the facts upon which he bases his opinion*, if those facts are either incorrect or incomplete, or *if his assessment of them is erroneous*, the statement may still imply a false assertion of fact.<sup>136</sup>

The clear import of this passage is that falsity analysis under the First Amendment is not concerned with whether the author actually holds a certain viewpoint or whether he discloses his factual predicate. Instead, subjective assertions are actionable under the Constitution if there is objective evidence which demonstrates that the statement is false.

This is not to say that no constitutional protections exist for subjective evaluations. These types of statements receive protection under the culpability requirements of *New York Times*, *Butts*, and *Gertz*.<sup>137</sup> In sum, the culpability requirements add reasonableness to the equation, which varies based on the public or private nature of the plaintiff. For example, if a newspaper columnist writes a story about a criminal suspect and concludes that he committed murder, this statement is clearly a factual assertion and can be interpreted as stating an actual fact. Whether the paper is liable for defamation depends on whether the author's interpretation of the facts is reasonable. For an accusation against a public official or figure, the author is liable only if he acted with knowledge or reckless disregard for the truth, which would be very difficult to prove unless the story is entirely fabricated. On the other hand, if the suspect is a private plaintiff, then liability attaches if the author acted at least negligently in analyzing the facts.

Analyzing subjective assertions based on a fault standard certainly comports

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135. A comparison of the majority's holding and Justice Brennan's dissent illustrates this point. Justice Brennan argued that the statements should receive protection because the author disclosed his underlying facts; therefore, reasonable readers would know that the statement were merely subjective assertions (or conjecture) of the author. *Milkovich*, 497 U.S. at 28. The majority, however, did not discuss the column's disclosure of underlying facts. It focused on whether the connotation that *Milkovich* lied could be proven true or false. *Id.* at 21.

136. *Milkovich*, 497 U.S. at 18-19 (emphasis added).

137. One commentator states, "[i]f underlying facts is the basis for making an opinion actionable, the opinion rule becomes very similar to the constitutional basis for imposing liability for misstatement of facts under *Gertz* and *New York Times Co. v. Sullivan*." Phillips, *supra* note 133, at 650 (citations omitted).

with the conclusion of *Milkovich*. The Court never held that the newspaper was liable; it merely remanded the case so that a jury could determine whether the statements were false and the defendant acted with the requisite level of fault. In analyzing the falsity issue, the jury would examine whether Milkovich lied at the trial. This analysis would focus strictly on the objective evidence. But, on the fault requirement, one of the relevant factors to be considered is whether Diadiun acted negligently in analyzing the facts upon which he based his assertion.

Additionally, requiring reasonableness is supported by other Supreme Court cases. In *Masson v. New Yorker Magazine, Inc.*,<sup>138</sup> *Bose Corp. v. Consumer Union of United States*,<sup>139</sup> and *Time, Inc. v. Pape*,<sup>140</sup> the Court addressed the evidence necessary to establish "actual malice" under the First Amendment. In *Pape*, the Court held that even if the specific language of the article conveyed a false meaning, actual malice does not exist when the chosen language was "one of a number of possible rational interpretations of a document that bristled with ambiguities."<sup>141</sup> The Court in *Masson*, however, refused to extend the "rational interpretation" test to cases where the author deliberately altered quoted materials. Instead, it determined that the relevant inquiry was whether the quotations, as altered, were substantially false.<sup>142</sup> If they are, then actual malice is established. These cases demonstrate that when a plaintiff attempts to show actual malice or fault, they may do so if the interpretation was unreasonable or is substantially false. In essence, the reasonableness of an author's interpretation may be shown by the requisite fault.<sup>143</sup>

Using fault analysis to determine the actionability of subjective assertions also holds true the balance between free speech and reputation. Analysis of culpability, unlike falsity analysis, provides varying degrees of protection based on the private or public nature of the plaintiff and the speech.<sup>144</sup> It necessarily provides a greater level of protection for evaluative criticisms of public figures and officials so that speech concerning public matters will remain "uninhibited, robust, and wide-open."<sup>145</sup> But, more importantly, it recognizes that subjective assertions about private individuals are subject to lower levels of protection.

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138. 501 U.S. 496 (1991).

139. 466 U.S. 485 (1984).

140. 401 U.S. 279 (1971).

141. *Pape*, 401 U.S. at 290.

142. *Masson*, 501 U.S. at 519 (quoting *Pape*, 401 U.S. at 285).

143. This analysis is hardly distinguishable from the approach taken by Judge Edwards in the second *Moldea v. New York Times Co.* case. In *Moldea II*, Judge Edwards granted First Amendment protection for a book review because it was a "supportable interpretation" of the thing being reviewed. 22 F.3d 310, 315-16 (D.C. Cir. 1994). The problem with Judge Edwards' analysis is that he used the supportable interpretation test as a basis for showing falsity rather than fault. Nonetheless, *Moldea II* at least demonstrates that subjective interpretations are not absolutely protected; instead, their protection depends, in part, on the reasonableness of the interpretation.

144. See discussion *supra* Part I.A.

145. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

This is so because private plaintiffs do not voluntarily subject themselves to such damaging criticism and states have a greater interest in providing redress for reputational harm. Thus, by using fault requirements, the Court in *Milkovich* reiterated the long standing principle that “not all speech is of equal First Amendment importance.”<sup>146</sup>

Second, *Milkovich* requires more cases to be decided by juries. Prior to *Milkovich*, most courts held that determinations of fact and opinion were a question of law for the court.<sup>147</sup> In this endeavor, lower courts determined the ultimate legal question of whether a reasonable reader would view the statement as constitutionally protected opinion or actionable assertions of fact.<sup>148</sup> *Milkovich*, however, shifts the focus of the analysis to fact versus non-fact. The relevant inquiry is whether the statements are “sufficiently factual to be susceptible of being proved true or false,”<sup>149</sup> which is a threshold question and not an ultimate legal determination. Thereafter, courts must analyze whether the context of the statement prevents a reasonable juror from interpreting it as a statement of actual fact. If a reasonable juror “could conclude that” a statement is factual, then the jury should decide the issue.<sup>150</sup>

A few post-*Milkovich* cases recognize the importance of allowing juries the opportunity to interpret the factualness. For example, the decision in *Kolegas v. Heftel Broadcasting Corp.* presented the proper balancing test between free speech and reputational interests by not overturning the jury’s factual interpretation of a statement. Because the jury reasonably interpreted that the defendant made factual assertions about the plaintiff, the court did not consider the abusive talk-radio format in which the statements were made.

However, most post-*Milkovich* courts do not allow juries to interpret factual verifiability if the statement is sufficiently factual to be proven true or false. For

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146. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988) (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758 (1985)).

147. *Potomac Valve & Fitting, Inc. v. Crawford Fitting Co.*, 829 F.2d 1280, 1285 n.12 (4th Cir. 1987); *Woods v. Evansville Press Co.*, 791 F.2d 480, 487 (7th Cir. 1986); *Mr. Chow of New York v. Ste. Jour Azur S.A.*, 759 F.2d 219, 224 (2d Cir. 1985); *Ollman v. Evans*, 750 F.2d 970, 978 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985); *Information Control Corp. v. Genesis One Computer Corp.*, 611 F.2d 781, 783 (9th Cir. 1980); *Orr v. Argus-Press*, 586 F.2d 1108, 1114 (6th Cir.), *cert. denied*, 440 U.S. 960 (1979); *Rinaldi v. Holdt, Rinehart & Winston, Inc.*, 366 N.E.2d 1299, 1306 (N.Y. 1977); *Baker v. Los Angeles Herald Examiner*, 721 P.2d 87 (Cal.), *cert. denied*, 479 U.S. 1032 (1987). For a thorough analysis of this topic, see Stern, *supra* note 11, at 631-38 (questioning why courts are better equipped than a jury in determining the meaning of a statement).

148. *Information Control Corp.*, 611 F.2d at 783 (citations omitted); *Gregory v. McDonnell Douglas Corp.*, 552 P.2d 425, 428 (Cal. 1976) (citing *National Ass’n of Letter Carriers v. Austin*, 418 U.S. 264 (1974)); *Greenbelt Coop. Publ’g Assn. v. Bresler*, 398 U.S. 6 (1970); *Emde v. San Joaquin County*, 143 P.2d 20 (Cal. 1943)).

149. *Milkovich*, 497 U.S. at 21 (emphasis added).

150. One commentator aptly states: “A panel that presumably includes at least some representatives of the expected audience would appear more capable than a court of ascertaining what meaning the context communicated to that audience.” Stern, *supra* note 11, at 634.

instance, in *Partington v. Bugliosi*,<sup>151</sup> the Ninth Circuit examined whether the plaintiff's book defamed the plaintiff attorney by implying that he was incompetent in representing his client. Based on the contextual factor that "lawyers who write popular books, and particularly trial lawyers, are not known for their modesty,"<sup>152</sup> it could not reasonably be interpreted as stating an actual fact.<sup>153</sup> This question should have been left to the jury. By suggesting that reasonable readers know lawyers, especially trial lawyers, are braggarts, the court in *Partington* usurped the jury's role in determining whether these statements could be interpreted as factual statements.

One interesting question that remains unanswered by *Milkovich* is whether First Amendment limitations apply to cases involving private plaintiffs on matters of private concern. Prior to *Milkovich*, most courts failed to distinguish between private and public plaintiffs because opinions "cannot, under *Gertz*, be 'false.'"<sup>154</sup> However, with the Court's rejection of the opinion privilege and its focus on the threshold question of factual verifiability, *Milkovich* sustains the possibility of removing constitutional protections for speech concerning private persons in private matters. Although the Court did not address this issue definitively, the case of *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,<sup>155</sup> illustrates the Court's unwillingness to protect speech on purely private matters.

In *Dun & Bradstreet*, a plurality of the Court held that private plaintiffs need not prove actual malice to recover punitive damages under *Gertz*, if the speech is of private concern.<sup>156</sup> The Court reasoned that while speech on matters of public concern is "'at the heart of the First Amendment's protection,'"<sup>157</sup> speech on purely private concerns is less important because "[t]here is no threat to the free and robust debate of public issues; there is no potential interference with a meaningful dialogue of ideas concerning self-government; and there is no threat of liability causing a reaction of self-censorship by the press."<sup>158</sup> Certainly, if the Court is unwilling to apply the *Gertz* requirements to matters of private concern, it is plausible that all First Amendment protections are inapplicable against private plaintiffs when the speech concerns private matters.

The Court's denial of certiorari in *Spence v. Flynt*<sup>159</sup> is indicative of this

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151. 56 F.3d 1147 (9th Cir. 1994).

152. *Id.* at 1154.

153. *Id.*

154. *Lewis v. Time, Inc.*, 710 F.2d 549 (9th Cir. 1983); *see also Ollman v. Evans*, 750 F.2d 970, 975 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985).

155. 472 U.S. 749 (1985).

156. The holding was supported by five justices with only three concurring in the plurality decision. *Id.* at 751. The other two concurring justices held that First Amendment requirements of falsity did not apply to any private plaintiffs, and thus, would have overruled *Gertz*. *Id.* at 764 (Burger, C.J., concurring), at 767 (White, J., concurring).

157. *Id.* at 758-59 (quoting *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978)).

158. *Id.* at 760 (quoting *Harley-Davidson Motorsports, Inc. v. Markley*, 568 P.2d 1359, 1363 (Ore. 1977)).

159. 816 P.2d 771 (Wyo. 1991), *cert. denied*, 503 U.S. 984 (1992).

point. The *Spence* case is remarkably similar to *Hustler Magazine, Inc. v. Falwell* because it involved abusive language and outrageous comments. The magazine stated that Spence, among other things, sold out his values to represent Andrea Dworkin in her suit against Larry Flynt. The Wyoming Supreme Court determined that this case was distinguishable from *Hustler* in that Spence was a private plaintiff and the speech concerned a private matter (his personal values). Therefore, it concluded that First Amendment protections were inapplicable and applied the “grossly defamatory statement” doctrine of *Chaplinsky v. New Hampshire*.<sup>160</sup> For obvious reasons, the Court’s denial of certiorari does not absolutely mean that the decision is correct or incorrect. It does suggest, however, that speech of purely private concern is unprotected by the First Amendment.

### III. STATE-CREATED PRIVILEGES FOR OPINION

In response to the perceived limitations of *Milkovich*, many state courts are interpreting their own common law and constitutions to provide absolute protection for opinions. Generally, these protections are based on either the *Restatement* “pure opinion” analysis or *Ollman*’s “totality of circumstances” test.

#### *A. Rebirth of the Absolute Privilege for Opinions Under the Common Law*

In recent years, some courts have expanded their common law doctrine of fair comment to include a privilege for opinions based on the *Restatement* or *Ollman*.<sup>161</sup> For example, in *Lyons v. Globe Newspaper Co.*,<sup>162</sup> the Supreme Judicial Court of Massachusetts held that a “pure” opinion under the second *Restatement* was protected under their common law. In *Lyons*, the plaintiff alleged defamation due to a report that he picketed a political convention.<sup>163</sup> Although the report was not entirely accurate, the court held that Massachusetts “adopted the principles governing expression of opinion set forth in § 566 of *Restatement (Second) of Torts* (1977).”<sup>164</sup> Since the underlying facts were disclosed for the author’s opinion, the article was non-actionable opinion.<sup>165</sup>

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160. 315 U.S. 568 (1942).

161. See, e.g., *Milsap v. Journal/Sentinel, Inc.*, 100 F.3d 1265, 1268 (7th Cir. 1996) (applying Wisconsin law, which does not protect statements merely phrased as opinions or beliefs, the Seventh Circuit found actionable the defendant’s comment that plaintiff reneged on paying people); *Colodny v. Iverson, Yoakum, Papiano & Hatch*, 936 F. Supp. 917, 927 (M.D. Fla. 1996) (court held that the fair comment privilege allows an “interested person to make a ‘fair comment’ on a public matter relating to an individual who has voluntarily made himself newsworthy.”); *Yancey v. Hamilton*, 1989 LEXIS 67, 36 K.L.S. No. 10 (Ky. 1989) (Supreme Court of Kentucky adopted the “pure” opinion analysis as their common law approach to defamatory opinions).

162. 612 N.E.2d 1158 (Mass. 1993).

163. *Id.* at 1160-61.

164. *Id.* at 1160 (citing *National Ass’n of Gov’t Employees, Inc. v. Central Broad. Corp.*, 396 N.E.2d 996 (Mass. 1979), *cert. denied*, 446 U.S. 935 (1980)).

165. *Id.* at 1163.

Likewise, in *Hiner v. Daily Gazette Co.*,<sup>166</sup> the Supreme Court of West Virginia used the second *Restatement* analysis for their “fair comment” privilege. In *Hiner*, the defendant newspaper alleged that the plaintiff attorney was under investigation for “unscrupulous” conduct and overcharging indigent clients.<sup>167</sup> Even though these statements were admittedly false, the defendant asserted a privilege of fair comment for editorial opinions.<sup>168</sup> The court agreed that its common law protected “sharp, vituperative and biting criticism,” but it also stated that “[u]nless an opinion, no matter how scurrilous, implies undisclosed defamatory facts, we protect it.”<sup>169</sup> Because the author failed to accurately disclose his underlying facts, the court found the statements to be actionable.

### *B. Rebirth of the Absolute Privilege for Opinions Under State Constitutions*

Like the use of a common law defenses for opinions, many states analyze their state constitutions to protect opinions. The first case to use such an approach, *Immuno AG. v. Moor-Jankowski*,<sup>170</sup> used a four factor analysis based on *Ollman* to provide greater protection for statements of opinion. In *Immuno*, a letter was written to the editorial column of the defendant’s science journal, in which the plaintiff Immuno, a biological product manufacturer, was criticized for its research methods.<sup>171</sup> Specifically, the author’s letter alleged that Immuno used non-captive chimpanzees, an endangered species, for product experimentation and research.<sup>172</sup> Although the letter was printed in the magazine’s editorial section with a preface that noted Immuno’s disapproval of the allegations, Immuno sued the editor for defamation.<sup>173</sup>

Originally, the New York Court of Appeals dismissed the libel suit as absolutely protected opinion under *Gertz*.<sup>174</sup> However, the Supreme Court vacated this decision and remanded the case for further consideration in light of *Milkovich*.<sup>175</sup> On remand, New York’s highest court was unsure of the limits imposed by *Milkovich* and it developed a dual analysis based on separate federal and state constitutional grounds. Under the federal standard, the court determined that the statements were sufficiently factual to be proven true; however, the court dismissed on the grounds that Immuno failed to meet the *Hepps* proof of falsity standard.<sup>176</sup>

Additionally, to prevent the case from going back to the Supreme Court, it

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166. 423 S.E.2d 560 (W. Va. 1992).

167. *Id.* at 565-69.

168. *Id.* at 577.

169. *Id.*

170. 567 N.E.2d 1270 (N.Y.), *cert. denied*, 500 U.S. 954 (1991).

171. *Id.* at 1272.

172. *Id.*

173. *Id.* at 1272-73.

174. *Immuno AG. v. Moor-Jankowski*, 549 N.E.2d 129 (N.Y. 1989).

175. 497 U.S. 1021, 1021 (1990).

176. *Immuno*, 567 N.E.2d at 1275-77.

also addressed *Immuno* on state constitutional grounds. The court of appeals first noted that its state constitution afforded enhanced protection for speech based on case precedents and the tradition of special reverence for freedom of expression espoused by the residents of New York.<sup>177</sup> By using state constitutional analysis, the court better “assure[s] that—with due regard for the protection of individual reputation—the cherished constitutional guarantee of free speech is preserved.”<sup>178</sup> To meet these aims, the court adopted *Ollman*’s “totality of circumstances” test as its constitutional standard for distinguishing fact from opinion. After examining the context of the article and the editor’s disclaimer, the court concluded that even if the language was serious and restrained, the average reader of the journal would view the statements as an expression of opinion.<sup>179</sup> Therefore, the letter was protected under New York’s constitution.

Since *Immuno*, several other states have protected opinion based on their constitutions.<sup>180</sup> In *West v. Thomson Newspapers*,<sup>181</sup> the Utah Supreme Court interpreted its state constitution to provide a privilege for statements of opinion. In *West*, the defendant newspaper asserted the mayor changed his position concerning a hotly contested public issue after being elected.<sup>182</sup> Although the trial court found the statements provable as true or false under *Milkovich*, the Utah Supreme Court reversed on the grounds that their state constitution provided greater protection than the federal Constitution. In the court’s analysis, it concluded that “expressions of pure opinion fuel the marketplace of ideas and because such expressions are incapable of being verified, they cannot serve as the basis for defamation liability.”<sup>183</sup> Like *Immuno*, the court adopted the *Ollman* four factor analysis as the basis for distinguishing fact and opinion.<sup>184</sup>

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177. *Id.* at 1277-79 (citing *Steinhilber v. Aphonte*, 501 N.E.2d 550, 553 (N.Y. 1986) (cited for the principle that the test for determining if a statement is opinion or fact is whether the reasonable reader believes the statements contained defamatory facts about the plaintiff based on the whole communication, its tone, and its apparent purpose)).

178. *Id.*

179. *Id.*

180. See *Vail v. Plain Dealer Publ’g Co.*, 649 N.E.2d 182 (Ohio 1995) (stating that the Ohio state constitution provides for a protection of opinion based on the four factor analysis of *Ollman*, regardless of the holding in *Milkovich*); *Lyons v. Globe Newspaper Co.*, 612 N.E.2d 1158, 1162-65 (Mass. 1993); *People for the Ethical Treatment of Animals v. Berosini*, 895 P.2d 1269 (Nev. 1995) (Nevada Constitution protects opinions). See also *Hickey v. Capital Cities/ABC, Inc.*, 792 F. Supp. 1195 (D. Or. 1992) (Oregon’s Constitution protects strong opinions).

181. 872 P.2d 999 (Utah 1994).

182. *Id.* at 1001.

183. *Id.* at 1015.

184. *Id.* at 1018. The four factors used by the court included: “(i) the common usage or meaning of the words used; (ii) whether the statement is capable of being objectively verified as true or false; (iii) the full context of the statement. . .; and (iv) the broader setting in which the statement appears.” *Id.*

### C. Legitimacy of State Constitutional Analysis

The decision in *Milkovich* is more than a limitation of First Amendment protection for opinions. It represents the Court's considered judgment that states are in a better position to determine the appropriate balance between protection of opinions and reputation. Based on the well established principle that "[t]he federal Constitution sets a floor [for individual rights], and states are free to raise that floor as long as they don't crash through the federal ceiling,"<sup>185</sup> several state courts have accepted *Milkovich*'s invitation to protect opinions based on state grounds. These courts rely on *Michigan v. Long*<sup>186</sup> for the proposition that if a case is decided on adequate and independent state constitutional grounds, then the Supreme Court cannot review it.<sup>187</sup>

Some commentators argue that using state constitutional analysis is an "illegitimate" tactic.<sup>188</sup> In fact, Judge Simons stated in his concurring opinion in *Immuno* that state constitutional analysis violates the tenets of judicial restraint and was constitutionally unsound because it denies the Supreme Court its ultimate legal authority.<sup>189</sup> However, the Court in *Milkovich* seemingly supports state constitutional analysis in defamation cases.<sup>190</sup> In a footnote, the Court discussed the Lorain Journal Company's argument that it was precluded from reviewing the case under *Long*.<sup>191</sup> The Court rejected this argument because the Ohio courts' decisions were based on an absolute privilege in *Gertz*; therefore, the decisions was "'at least interwoven with federal law,' and was not clear on its face as to the court's intent to rely on independent state grounds."<sup>192</sup> Nonetheless, the Court said that "the Ohio Supreme Court remains free, of course, to address all of the foregoing issues on remand."<sup>193</sup> This statement indicates, at the very least, that the Ohio Supreme Court could have decided the case on independent state grounds, but failed to do so.

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185. Berdon, *supra* note 2, at 665 (quoting Professor Laurence H. Tribe); *see also* Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74, 81 (1980) (the Supreme Court of California was free to interpret its constitution to provide additional protections of individual liberties so long as it did not go below the minimum standards of constitutional law); *Immuno*, 567 N.E.2d at 1277 (citations omitted).

186. 463 U.S. 1032 (1983).

187. *Id.* at 1038 (citing *Abie State Bank v. Bryan*, 28 U.S. 765, 773 (1931)).

188. See Earl M. Maltz, *The Dark Side of State Court Activism*, 63 TEX. L. REV. 995 (1985) (questioning the value of independent state constitutional review based on policy); Hans A. Linde, *Without "Due Process": Unconstitutional Law in Oregon*, 49 OR. L. REV. 125 (1970) (reviewing constitutional premises for judicial review of Oregon's regulatory policies).

189. *Immuno*, 567 N.E.2d at 1283-86 (Simons, J., concurring).

190. 497 U.S. at 10 n.5.

191. *Id.*

192. *Id.* (citing *Long*, 463 U.S. at 1040-41).

193. *Id.*

## CONCLUSION

The limitations imposed by *Milkovich* marks the Court's attempt to balance free speech and protection of reputation. By rejecting a wholesale privilege for opinions, the Court implicitly recognized that the opinion privilege potentially usurped states' interest in protecting reputation. Therefore, it set the federal floor of falsity analysis at factual verifiability. While this standard does not affect the applicability of the many pre-*Milkovich* opinion tests, it undoubtably prevents courts from granting summary judgment based solely on the subjectiveness of the assertion. This does not mean that subjective assertions are not protected under the First Amendment. Instead, when a speaker offers his viewpoint or evaluation, he will not receive immunity for that "opinion" if it is factually verifiable and his conclusion was unreasonable, which depends on the varying levels of constitutional fault for defamation.

It is important, however, to see *Milkovich* as more than a rejection of the constitutional privilege for opinions. The decision represents the Court's careful judgment that states have an interest in balancing "the need to redress injuries to reputation with guarantees of free expression in a distinct way, thereby accounting for the unique history, needs, and experiences of their residents."<sup>194</sup> As such, states are free to limit protection based on pre-existing First Amendment case law. But, they also are free to raise the level of protection for opinions based on their constitutions and common law. This allows states autonomy to protect the interest of their private citizens, but also leaves uninhibited the federal interest in free speech concerning public matters.

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194. West v. Thomson Newspaper, 872 P.2d 999, 1007 (Utah 1994).

# INTERPRETATION OF PATENT PROCESS CLAIMS IN LIGHT OF THE NARROWING EFFECT OF 35 U.S.C. § 112(6)

BRAD A. SCHEPERS\*

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## INTRODUCTION

The scope of coverage of a patent is likely one of the most important and controversial aspects of modern intellectual property law. This Note will generally address patent claims which use functional language in an attempt to broaden their scope of coverage. Furthermore, this Note will specifically analyze the scope of protection which will likely be imparted to highly functional process (or method) claims<sup>1</sup> in light of the language contained in the Patent Act of 1952<sup>2</sup> and recent decisions handed down from the United States Court of Appeals for the Federal Circuit (“Federal Circuit”).

An element of a functional claim is described in terms of what it does rather

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1. See *infra* note 14 and accompanying text (for a discussion regarding process and method claims and the inherent relationship between them).

2. Ch. 950, 66 Stat. 792 (1952) (codified as amended at 35 U.S.C. § 1-376 (1994)).

than by its physical structure.<sup>3</sup> Many patent practitioners use functional language in an attempt to broaden a patent's scope of coverage through what is commonly referred to as "means-plus-function" and "step-plus-function" claim formats.<sup>4</sup> Title 35, section 112, paragraph six ("§ 112(6)") of the United States Code sanctions the use of functional language in the expression of an element in a combination claim<sup>5</sup> through either of the two formats.<sup>6</sup>

As functional language could be written broadly enough to encompass every existing and future structure capable of performing a claimed function, § 112(6) places statutory limits on the breadth of functional claims.<sup>7</sup> Specifically, the scope of functional claims expressed in the "means" or "step" formats will be limited to the "structure, material, or acts described in the specification and the equivalents thereof."<sup>8</sup> Consequently, a functional patent claim falling within the purview of § 112(6) cannot be read independently from the rest of the patent. Instead, it must be narrowly construed in light of that which is disclosed in the patent's specification.<sup>9</sup>

Although § 112(6) has been in existence since 1952,<sup>10</sup> the United States Patent and Trademark Office ("USPTO") had never applied paragraph six during the prosecution stage<sup>11</sup> of a patent prior to 1994. This led to considerable

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3. *Halliburton Oil Well Cementing Co. v. Walker*, 329 U.S. 1, 9 (1946).

4. For example, a claim element which states "a means for attaching part A to part B" would theoretically cover any and all structures or materials which could be used to attach the two parts. The "means" used would cover nails, screws, glue, weld, or even magnetism and still be within the claim's scope of protection. Similarly, a claim which states "a step for cooling mixture A until it reaches a semi-solid state" would theoretically cover any process or method for cooling the mixture including refrigeration, induction cooling, etc. The Federal Circuit has already placed limitations on the scope of means-plus-function language, but has remained largely silent regarding the limits to be placed on functional process claims.

5. See *infra* notes 146-47 and accompanying text (for a discussion regarding the requirements for a combination claim).

6. 35 U.S.C. § 112 (1994). Step-plus-function language is used extensively in the description of process claims and its allowance under paragraph six will be discussed throughout this Note.

7. Absent the statutory limitations placed on functional language, entire fields of products and processes could be monopolized by a patent holder. The conflicting policies regarding both broad and narrow claim interpretation are discussed *infra* in note 29. See also *Valmont Industries, Inc. v. Reinke Mfg. Co.*, 983 F.2d 1039, 1042 (Fed. Cir. 1993) (citing *Johnston v. IVAC, Corp.*, 885 F.2d 1574, 1580) (Fed. Cir. 1989) (In expressing the potential "threat" posed by functional claim language, the court stated that "[a] claim limitation described as a means for performing a function, if read literally, could encompass any conceivable means for performing the function.").

8. 35 U.S.C. § 112 (1994).

9. See *infra* notes 16-20 and accompanying text (discussion regarding the statutory requirements of the specification section of a patent).

10. The citation for the current language found in paragraph six of § 112 was the original text of § 112(3) as contained in the 1952 Patent Act.

11. The prosecution of a patent generally involves submission of a written application to the

confusion among judges and practitioners alike regarding the scope of protection to be given a patent expressed in functional claim language. Ultimately, the Federal Circuit, via the *In re Donaldson*<sup>12</sup> decision, mandated that the USPTO apply § 112(6) to all means-plus-function claims during patent prosecution.<sup>13</sup> This landmark decision ended speculation regarding the scope of protection allowable under this type of claim format.

Although *In re Donaldson* was explicit regarding the scope of means claims, it made no direct reference to the step-plus-function language used extensively in process claims. Hence, a new area of confusion has arisen from a statute which is seemingly very clear on its face. As a process patent claim<sup>14</sup> is, by definition, a functional claim, and its elements are essentially expressed in terms of a combination of “steps,” there would appear to be very little question regarding whether this type of claim falls within the grasp of § 112(6).<sup>15</sup> Nonetheless, there have been no judicial decisions, either before or after *In re Donaldson*, which have interpreted the precise meaning behind the “step-plus-function” language as it appears in the statute.

Thus, the questions that naturally arise are: (1) “Does the narrowing effect of § 112(6) apply to process claims employing functional language?” and if so, (2) “What types of process claims are covered by § 112(6), and under what circumstances will their scope of protection be diminished?” This Note analyzes these questions and suggests how the Federal Circuit might rule in this yet unsettled area of intellectual property law.

## I. BACKGROUND INFORMATION ON PATENTS AND PATENT CLAIMS

The analysis of a patent claim’s scope of protection requires the understanding of a few basic principles of patent law. Additionally, in order to differentiate between the linguistic styles used in the drafting of functional claim

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USPTO (in fulfillment of the requirements of 35 U.S.C. § 111) and an initial examination of the application by the USPTO to determine patentability (35 U.S.C. § 131). *See* 35 U.S.C. §§ 111, 131 (1994). If the application is disallowed, the applicant can either argue why the application is patentable under current law or can amend or correct the patent application to conform with the demands of the USPTO. *Id.* § 251.

12. 16 F.3d 1189 (Fed. Cir. 1994).

13. *Id.* at 1193.

14. The terms “process claim” and “method claim” are essentially synonymous and will be used interchangeably throughout this Note. *See In re Chatfield*, 191 U.S.P.Q. 730, 737 (C.C.P.A. 1976) (Rich, J., dissenting) (method is the equivalent of process by statutory definition). A process claim is essentially a combination of steps performed either wholly by a machine or a person or partly in combination.

15. Section 112 states that a claim element can be described in terms of a “step” for achieving a desired function, thus implying that process claims fall within the realm of the statute. Likewise, the additional language of “without the recital of . . . acts in support thereof” indicates the same conclusion due to the close relationship between the terms “acts” and “step.” 35 U.S.C. § 112 (1994) (emphasis added).

language, the basic structure of the two primary types of patent claims must be generally understood.<sup>16</sup> Accordingly, this section provides general background information regarding the various elements which comprise a patent and the types of claims commonly used in the drafting of a patent application.

The structure of a patent includes two primary elements. First, the disclosure section (the “specification”) contains a clear, written description of the invention and the preferred method contemplated by the inventor on how the invention will be performed or carried out.<sup>17</sup> Second, the claims of a patent, typically following the specification, are generally written broadly in an attempt to gain expansive protection over the invention.<sup>18</sup> In contrast, as a valid patent need only disclose a single version of the claimed invention,<sup>19</sup> the specification is often written quite narrowly. The narrow drafting of the specification is usually of little concern to the practitioner because the language within the claims normally defines the scope of patent protection.<sup>20</sup> Courts have generally agreed with the proposition that claims are not limited by what is disclosed in a patent’s specification.<sup>21</sup>

Nonetheless, in some cases, the specification does place limitations on the scope of protection offered by the claims of a patent. When functional language is used to draft broad, all-encompassing claims, the provisions of the Patent Act step in and restrict the scope of coverage to that which is disclosed in the specification and its equivalents.<sup>22</sup> This exception to the general rule and its application in determining the scope of process claims are the focal point of this Note. As the issues surrounding the application of § 112(6) primarily revolve around which *types* of functional claims fall within the realm of paragraph six,

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16. The “apparatus claim” has been defined as “a mechanical device or combination of mechanical powers and devices . . . .” *Corning v. Burden*, 56 U.S. 252, 267 (1853). The “process claim” has been characterized as “a mode or treatment of certain material to produce a given result.” *Cochrane v. Deener*, 94 U.S. 780, 788 (1876). *See infra* notes 23-25 and accompanying text (for additional definition of apparatus and process claims).

17. 35 U.S.C. § 112 (1994). The disclosure section also contains any drawings or illustrations necessary to more clearly convey the elements of the invention and how it is made or used.

18. *Id.* Technically, the claims section concludes the specification, but it is a well accepted notion that the specification and the claims are treated as separate elements of a patent.

19. *Id.* The single version of the invention is often referred to as the “preferred embodiment” or the “best mode” and is written in specific, narrow language including details relating to the elements of the invention as well as how it will be made and/or used.

20. *See generally* ROBERT L. HARMON, PATENTS AND THE FEDERAL CIRCUIT 13 (1994) (a patent’s claims are not limited to the details recited in the specification nor to the best mode of operation).

21. *See Sjolund v. Musland*, 847 F.2d 1573, 1582 (Fed. Cir. 1988) (the specification section of a patent does not place limitations on its claims); *Texas Instruments, Inc. v. United States Int’l Trade Comm’n*, 805 F.2d 1558, 1562 (Fed. Cir. 1986) (the specification need not include every variation of the invention and the claims should not be read narrowly in light of a narrowly written specification).

22. 35 U.S.C. § 112 (1994).

the precise language of the statute is closely examined to determine under what circumstances it will apply.

The types of claims which may be used in the drafting of a patent are statutorily defined by patentable classes of inventions. These allowable classes include “any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof.”<sup>23</sup> The term “process” is further defined by the Patent Act as a “process, art or method, and includes a new use of a known process, machine, manufacture, composition of matter, or material.”<sup>24</sup> Accordingly, the two principal types of patent claims permitted in the United States are the apparatus claim and the process claim.<sup>25</sup> The apparatus claim is directed to machines, articles of manufacture, or other compositions of matter, whereas the process claim covers new uses or methods relating to a known process or apparatus.

As a general rule, practitioners draft patent claims as expansive as possible in order to obtain maximum protection for their clients.<sup>26</sup> If claim language is drafted broadly and interpreted in a like manner, the patent will preclude competitors from making, using, or selling the specific embodiment of the product or process.<sup>27</sup> More importantly, the patent will also offer protection against all expected and unanticipated equivalents.<sup>28</sup> However, if the language of a claim is written and interpreted narrowly, patent protection will be limited. The patent’s commercial value will be minimal as the narrowly drafted claim will offer competitors ample opportunity to design around or “reverse engineer” the claimed product or process. Since a patent holder’s goal is to obtain maximum protection and preclude others from exploiting his invention, he would prefer to see the claims of his patent interpreted very broadly. Conversely, the patentee’s competitors would like to make, use, or sell devices similar to the concept enveloped by the patent and would prefer a much narrower interpretation of the patent’s claims. Consequently, the USPTO and the Federal Circuit must balance the interests of both the patentee and the competitor when making policy decisions regarding the scope of patent claims.<sup>29</sup>

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23. *Id.* § 101.

24. *Id.* § 100(b).

25. Practitioners also use other claim formats such as the “product by process” claim, the “kit” claim, and the “Jepson” and “Markush” claims.

26. See generally ROBERT C. FABER, *The Winning Mechanical Claim*, FIFTH ANNUAL PATENT PROSECUTION WORKSHOP: ADVANCED CLAIM AND AMENDMENT WRITING 231, 249-90 (1995) (explaining the process of how to draft broad patent claims with an emphasis on the drafting of mechanical apparatus claims).

27. 35 U.S.C. § 154 (1994).

28. *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 339 U.S. 605 (1950) (establishing the tripartite test for equivalency); see *infra* note 45 (for additional case law concerning the doctrine of equivalents).

29. There are conflicting policy concerns regarding how much protection should be imparted to patent claims. On one hand, there is a need to grant the patentee sufficient protection to avoid situations which make it exceedingly easy to “design around” the patent. Under a policy of narrow

In an attempt to expand a patent's scope of coverage, functional claim language is frequently used to broadly define an apparatus or process.<sup>30</sup> An apparatus claim may be expressed in terms of "means-plus-function" language, describing what the particular apparatus does rather than reciting its physical structure.<sup>31</sup> Likewise, a process or method is usually expressed in terms of a "step-plus-function," specifically reciting the primary function of each process step. This type of claim is commonly used to describe the operation or result of a previously recited claim element.<sup>32</sup> The scope of protection offered by functional language may seem broad on the face of the claim, but the coverage realized may be quite limited. This "narrowing effect" on a patent's scope and its applicability to functional process claims will be discussed in greater detail throughout the remainder of this Note.

## II. HISTORICAL DEVELOPMENT OF THE USE OF FUNCTIONAL LANGUAGE IN PATENT CLAIMS AND THE RESULTING ENACTMENT OF 35 U.S.C. § 112(6)

Prior to the enactment of § 112(6) in 1952, there were several conflicting opinions among the federal courts as to whether functional language in a patent claim should even be allowed. Decisions ranged from treating functional claims

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claim interpretation, there is little incentive for corporations to spend large amounts of capital on research and development projects if they are not allowed a limited monopoly on the invention for the period of time necessary to recoup their expenditures. In contrast, there is a conflicting concern that if patent claims are interpreted too broadly, there will be reduced incentive for industry to continue the development of existing, patented technology. Under a policy of broad claim interpretation, there is limited motivation for competitors (and arguably the patentee) to make advancements/improvements to products situated in fields which are already heavily patented; thus stifling the continued growth of technology. *See generally* Robert P. Merges & Richard R. Nelson, *On the Complex Economics of Patent Scope*, 90 COLUM. L. REV. 839, 843 (1990) (a summary of the problems associated with the scope imparted to patent claims and the effects of a broadly interpreted patent on the advancement of technology in a particular industry); Rafael X. Zahralddin, *The Effect of Broad Patent Scope on the Competitiveness of United States Industry*, 17 Del. J. Corp. L. 949 (1942) (a survey of the semiconductor and software industries and how their economic development is significantly impeded by the broad interpretation of patent claims).

30. Practitioners have historically used functional claim language with the expectation that, during litigation, they would be able to argue that the claim literally covered any means or step for performing the specified function (either known or unknown at the time of filing the patent application). The applicant's claim was essentially a "moving target" during an infringement action because it could either be narrowed or broadened depending on the argument set forth by the opponent.

31. *See supra* notes 3-4 and accompanying text. Under certain circumstances, applicants attempting to patent pre-existing technology functioning in a new and unique way may have no other alternative but to draft claims in functional language.

32. *See supra* note 4 (for an example illustrating this proposition).

as “void”<sup>33</sup> to upholding them as being “definite”<sup>34</sup> as well as several other variations in between.<sup>35</sup>

The disarray among the federal courts ultimately resulted in the 1946 Supreme Court decision of *Halliburton Oil Well Cementing Co. v. Walker*.<sup>36</sup> The Court ended the inconsistent treatment of functional claims by holding that such language was fatally indefinite and void when used to describe “the most crucial element” of a combination claim.<sup>37</sup> The Court feared that claim language describing what an element did, instead of specifically identifying what it was, might be overbroad and ambiguous.<sup>38</sup> Instead of placing defined limits on the scope of functional claims,<sup>39</sup> thereby making them more definite, the Court chose to eliminate them from patent law altogether if used to describe a claim’s primary component.<sup>40</sup>

The ruling set out in *Halliburton* was later applied in several decisions. Most notably, the court in *In re Fullam*<sup>41</sup> held that the USPTO properly rejected certain patent claims as being “functional in claiming merely the desired result well known to and sought after by workers skilled in the art.”<sup>42</sup> The court rationalized the rejection by stating that the article in question was defined “not in terms of

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33. *Tyden v. Ohio Table Co.*, 152 F. 183, 185 (6th Cir. 1907) (holding that a functional claim “cannot be upheld and must be found void”); *see also General Elec. Co. v. Wabash Appliance Corp.*, 304 U.S. 364, 368 (1938) (a claim written in functional language was void as being too indefinite).

34. *Continental Paper Bag Co. v. Eastern Paper Bag Co.*, 210 U.S. 405 (1908) (upholding a functional combination claim which contained the specific elements of a “means for operating the forming plate” and a “means to cause said plate to oscillate” in combination with other elements).

35. *See, e.g., Mead Johnson & Co. v. Hillman’s Inc.*, 135 F.2d 955, 958 (7th Cir.) (functional claims can not be used as a means to differentiate over prior art), *cert. denied*, 320 U.S. 752 (1943); *Farmers’ Cooperation Exchange v. Turnbow*, 111 F.2d 728, 732 (9th Cir.) (functional claim language is void if used at the point of novelty), *cert. denied*, 311 U.S. 681 (1940).

36. 329 U.S. 1 (1946).

37. *Id.* at 9. The claim at issue covered a “means for tuning said receiving means to the frequency of echoes from the tubing [coupling] collars to clearly distinguish the echoes from said couplings from each other.” *Id.* n.7. The Court found this claim to be invalid due to the indefiniteness of the means language. *Id.* at 8-9, 12.

38. *Id.* It appears that the Court was primarily concerned with the effect functional claim language would have on the continued development of technology. For example, the Court theorized that functional language would stifle future creativity because “there may be many other devices beyond our present information or indeed our imagination which will perform that function and yet fit these claims” and that without the perceived hindrance of functional language, “inventive genius may evolve many more devices to accomplish the same purpose.” *Id.* at 12; *see supra* note 29 (for a discussion of the conflicting policy concerns regarding a patent’s scope of coverage).

39. Six years subsequent to *Halliburton*, Congress placed such limitations on the scope of functional claims through the enactment of paragraph six of 35 U.S.C. § 112.

40. *Halliburton*, 329 U.S. at 9.

41. 161 F.2d 247 (C.C.P.A. 1947).

42. *Id.* at 250.

what it is, but of what it does.”<sup>43</sup> The sentiment in the courts prior to the enactment of the Patent Act was that “[c]laims directed merely to a ‘desired result’ have long been considered objectionable primarily because they cover any means which anyone may ever discover of producing the result.”<sup>44</sup>

In response to *Halliburton* and the uncertainty surrounding functional claim language prior to this landmark decision, Congress enacted 35 U.S.C. § 112(6) authorizing the expression of a claim element in terms of a means or step for performing a specific function. Specifically, the statute states:

An element in a claim for a combination may be expressed as a means or step for performing a specified function without the recital of structure, material or acts in support thereof, and such claim shall be construed to cover corresponding structure, material, or acts described in the specification and equivalents<sup>45</sup> thereof.<sup>46</sup>

When Congress enacted the statute, it overruled the Supreme Court by sanctioning the use of broad and indefinite means or step-plus-function language. However, there was a “catch” built into the statute that placed a limitation on the scope of protection which would be imparted to functional claim language.

The first clause of paragraph six allows an element within a combination claim to be expressed in terms of a means or step for performing a specific function without having to expressly recite the structure, material or acts which perform the function.<sup>47</sup> This portion of the statute contains the language which overruled *Halliburton* by allowing claim elements to be expressed in purely functional terms. Congress’ inclusion of the second clause of paragraph six indicates that they, like the Supreme Court, had concern over the broadness and ambiguity surrounding functional language. While a functional claim need not recite the structure, material or acts for performing the specified function, the

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43. *Id.* at 249. (citing *General Elec. Co. v. Wabash Appliance Corp.*, 304 U.S. 364 (1938)). In *General Electric*, the Supreme Court condemned the convenient use of functional language at the exact point of novelty. *Id.* at 371.

44. *In re Fuetterer*, 138 U.S.P.Q. 217, 221 (C.C.P.A. 1963); *see also O'Reilly v. Morse*, 15 How. 62 (1853); *Heidbrink v. McKesson*, 290 F. 665 (1923).

45. The test for equivalency is beyond the scope of this Note, however, the following cases have dealt with the issue in great detail: *Valmont Indus., Inc. v. Reinke Mfg. Co.*, 983 F.2d 1039 (Fed. Cir. 1993) (establishing the “insubstantial change” test and its applicability to § 112); *In re Bond*, 910 F.2d 1039 (Fed. Cir. 1990) (further defining the term “equivalents”); *Pennwalt Corp. v. Durand-Wayland, Inc.*, 833 F.2d 931 (Fed. Cir. 1987), *cert. denied*, 485 U.S. 961 (1988) (the term “equivalents” as used in § 112 was distinguished from the equitable doctrine of equivalents); *P.M. Palumbo v. Don-Joy Co.*, 762 F.2d 969 (Fed. Cir. 1985) (*Graver Tank* equivalency test is applicable to § 112); *Graver Tank & Mfg. Co.*, 339 U.S. 605 (1950) (establishing the triparte test for equivalency). *See generally Craig Wallace, A Proposed Standard Jury Instruction for a Patent Infringement Inquiry Under the Doctrine of Equivalents*, 10 Santa Clara Computer & High Tech. L.J. 425, 456 (1994).

46. 35 U.S.C. § 112 (1994).

47. *D.M.I. Inc. v. Deere & Co.*, 755 F.2d 1570, 1574 (Fed. Cir. 1985).

second clause mandates that such claims be construed to cover only the corresponding structure, material or acts *described in the specification* and their equivalents.<sup>48</sup> Consequently, the later portion of the statute drastically restricts the broad scope of protection offered by the former.

### III. FEDERAL DECISIONS INTERPRETING 35 U.S.C. § 112(6)

Although there have been many federal decisions interpreting § 112(6) since its enactment,<sup>49</sup> the past decade has produced few Federal Circuit cases illustrating the “narrowing effect” of the statute.<sup>50</sup> Likewise, there have been a limited number of decisions addressing the circumstances under which § 112(6) will apply.<sup>51</sup> Ultimately, the judicial decisions of the past four decades have culminated into a handful of recent Federal Circuit *en banc* opinions which now largely define this area of patent law.

The first of the relatively recent Federal Circuit decisions to interpret the scope of “means-for”<sup>52</sup> language with respect to § 112(6) was *Carrol Touch, Inc. v. Electro Mechanical Systems Inc.*<sup>53</sup> In a patent infringement context, the court held that “[i]n order to meet a means-plus-function limitation, an accused device must (1) perform the identical function recited in the means limitation and (2) perform that function using the structure disclosed in the specification or an equivalent structure.”<sup>54</sup> Consequently, the Federal Circuit narrowed the protection afforded “means-for” language in cases involving patent infringement.<sup>55</sup> The court did so by judicially requiring what § 112(6) had legislatively mandated over forty years earlier.<sup>56</sup> Namely, the scope of a functional means claim must be limited to the “structure, material, or acts

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48. *Valmont Industries*, 983 F.2d at 1042 (emphasis added).

49. See generally WOODCOCK, PATENT ACT OF 1952—TEN YEARS OF INTERPRETATION: SECTION 112, 157 (1962) (an analysis of case law interpreting paragraph six of § 112 throughout the initial ten years subsequent to enactment of the Patent Act in 1952).

50. See *Jonsson v. Stanley Works*, 903 F.2d 812, 819 (Fed. Cir. 1990) (citing the *Johnston* holding); *Johnston v. IVAC Corp.*, 885 F.2d 1574, 1580 (Fed. Cir. 1989) (discussing how paragraph six “cuts back” on the types of means which can literally satisfy functional claim language); *Data Line Corp. v. Micro Technologies, Inc.*, 813 F.2d 1196, 1201 (Fed. Cir. 1987) (addressing the restrictive nature of paragraph six); *Pennwalt*, 833 F.2d at 934.

51. See *Arrhythmia Research Tech., Inc. v. Corazonix Corp.*, 958 F.2d 1053 (Fed. Cir. 1992); *In re Iwahashi*, 888 F.2d 1370, 1375 (Fed. Cir. 1990) (an apparatus claim covering data processing equipment for voice recognition expressed in means-plus-function language was upheld under paragraph six); *In re Bernhart*, 417 F.2d 1395, 1399 (C.C.P.A. 1969) (a mechanical drawing apparatus expressed in “means” form was allowed under paragraph six of § 112).

52. The phrase “means-for” is synonymous with the phrase “means-plus-function” and both will be used interchangeably throughout this Note.

53. 27 U.S.P.Q. 2d 1836 (Fed. Cir. 1993).

54. *Id.* at 1840.

55. *Id.*

56. *Id.*; see *Valmont Indus., Inc. v. Reinke Mfg. Co.*, 983 F.2d 1039 (Fed. Cir. 1993).

described in the specification and equivalents thereof.”<sup>57</sup>

In 1994, the Federal Circuit, sitting en banc, buttressed its opinion regarding the use of functional claim language. The decisions of *In re Alappat*<sup>58</sup> and *In re Donaldson*<sup>59</sup> outline the present state of patent law with respect to functional apparatus claims and how they must be interpreted in infringement actions and during the prosecution of a patent.<sup>60</sup>

The *Alappat* decision involved a patent claim for a device used to sample an incoming electrical signal frequency and record the resulting data which would ultimately be used to produce a visual waveform.<sup>61</sup> The claim specifically covered a means for looking up memory locations in a table created by the resulting data in order to display the data as a smooth line.<sup>62</sup> Following a heated conflict between the USPTO and the Board of Patent Appeals,<sup>63</sup> the Federal Circuit held that the “means for” claim was sanctioned by § 112(6) and, accordingly, its scope of coverage was limited to the structures disclosed in the specification and their equivalents.<sup>64</sup> Every judge on the Federal Circuit agreed that the Board had erred in not applying the limiting effect of paragraph six to the claim at issue.<sup>65</sup>

The court in *In re Donaldson* similarly ruled that the narrowing effect of § 112(6) must be applied by the USPTO during the patent prosecution stage to claims employing means-plus-function language.<sup>66</sup> This decision put an end to the USPTO’s long standing practice of refusing to apply § 112(6) during the patent examination process.<sup>67</sup> The Federal Circuit, sitting en banc, mandated that

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57. 35 U.S.C. § 112 (1994).

58. 33 F.3d 1526 (Fed. Cir. 1994).

59. 16 F.3d 1189 (Fed. Cir. 1994).

60. See *infra* notes 66-69 and accompanying text (discussion regarding how *In re Donaldson* required the USPTO to apply paragraph six during patent prosecution).

61. 33 F.3d at 1551-52.

62. *Id.* at 1552.

63. The USPTO initially refused to depart from its prior practice of not applying the narrowing effect of paragraph six of § 112 during the prosecution stage of a patent. In order to more strongly assert its position, the Commissioner of the USPTO appointed himself and four other senior officials to the Board of Appeals to rehear the case of *Ex Parte Alappat*. 23 U.S.P.Q.2d 1340 (Bd. Pat. App. & Interferences 1992). The Commissioner’s attempt to “stack the court” only served to escalate the long-standing disagreement between the USPTO and the Board of Appeals. *Id.* at 1347 (original three-member board expressed considerable indignation toward the “expanded” board’s majority opinion).

64. *Alappat*, 33 F.3d at 1540.

65. *Id.*

66. 16 F.3d 1189, 1193 (Fed. Cir. 1994). The patent application related to an industrial air-filtering device (i.e. dust collector) which included a claim element covering “a lowermost portion . . . arranged and constructed for the collection of particulate matter, said portion having *means . . . for moving particulate matter in a downward direction* to a bottommost point . . . .” *Id.* at 1191 (emphasis added).

67. Prior to the *In re Donaldson* decision, it was common practice for the USPTO to

a means-plus-function claim limitation be interpreted by the USPTO in accordance with § 112(6).<sup>68</sup> The court firmly stated that “[p]er our holding, ‘the broadest reasonable interpretation’ that an examiner may give means-plus-function language is that statutorily mandated in paragraph six. Accordingly, the PTO may not disregard the structure disclosed in the specification corresponding to such language when rendering a patentability determination.”<sup>69</sup>

While *Alappat* and *In re Donaldson* may have cleared up any confusion and ambiguity surrounding means-plus-function claim language, they were noticeably silent as to claims employing step-plus-function language (which would seemingly be covered under the same statutory provision).<sup>70</sup> In light of this fact, guidance regarding how process claims are to be treated under § 112(6) can only be derived from perceived Congressional intent and analogous case law construing functional apparatus claims.

#### IV. ANALYSIS OF PROCESS CLAIMS IN LIGHT OF THE NARROWING EFFECT OF 35 U.S.C. § 112(6)

Although the application of § 112(6) to process claims may seem straightforward in light of the expressed provisions of the statute,<sup>71</sup> there have been no Federal Circuit decisions which have directly addressed this unsettled area of patent law.<sup>72</sup> The Sixth Circuit has, however, expressed its viewpoint

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disregard paragraph six of § 112 during the prosecution of a means-plus-function claim. This enabled the USPTO to reject a claim without having to examine the structures disclosed in the specification and compare them to prior recited art. This anomaly in the law with respect to the differing treatment of functional claims during prosecution and actions of infringement was the primary catalyst behind the *In re Donaldson* decision. *Id.* at 1194.

68. *Id.* at 1193. The court also noted that its holding did not conflict with the general principle that claims are to be given their “broadest reasonable interpretation” during the prosecution of a patent. *Id.* at 1194 (quoting *In re Prater*, 415 F.2d 1393, 1404-05 (C.C.P.A. 1969)). Interestingly, the court noted that *Prater* distinguished the process claims at issue from other apparatus claims contained in the patent because the apparatus claims used “typical means-plus-function language as expressly permitted by the third paragraph [now sixth] of 35 U.S.C. § 112.” *Id.* at 1195 n.6. It is unclear whether *In re Donaldson* was in general agreement with the policy of treating apparatus and process claims differently under paragraph six or whether the court was simply pointing out a flaw in the *Prater* opinion.

69. *Id.* at 1194-95.

70. Recall that means-plus-function language generally applies to apparatus claims, whereas step-plus-function language is commonly used in the drafting of process/method claims. *See supra* notes 4, 23-25 and accompanying text.

71. “An element in a claim . . . may be expressed as a . . . step for performing a specified function.” 35 U.S.C. § 112 (1994).

72. Professor Irving Kayton, a prominent scholar in the field of patent law, has expressly stated that “it is fundamental that nearly all steps recited in process claims fall within this provision of the Patent Statute.” IRVING KAYTON, DETAILS OF HOW TO DRAFT CLAIMS FOR MACHINES, ARTICLES OF MANUFACTURE, METHODS AND COMPOSITIONS OF MATTER, 10-1, 10-29, (Irving

regarding this largely undecided question in *Noll v. O.M. Scott & Sons Co.*<sup>73</sup> The court found that the following method claim for crabgrass control fell within the grasp of § 112(6): the step of applying a substance to crabgrass including a chemical “in a concentration and amount sufficient to destroy crabgrass but insufficient to destroy material quantities of the useful grasses and plants.”<sup>74</sup> The court’s decision was primarily based on the fact that the claim was expressed in terms of a “step” (applying a substance to crabgrass) for “performing a specified function” (to destroy crabgrass but not the useful grasses and plants).<sup>75</sup>

In *Arrhythmia Research Technology, Inc. v. Corazonix Corp.*,<sup>76</sup> a patent claim covered a method for analyzing an EKG as well as an apparatus used to perform the analysis.<sup>77</sup> The apparatus elements were held to fall under paragraph six because they were expressed in typical means-plus-function language.<sup>78</sup> Curiously, the court failed to mention how the statute’s treatment of method claims differed from that of apparatus claims.<sup>79</sup> The court did, however, expressly indicate that the “claimed steps of ‘converting,’ ‘applying,’ ‘determining,’ and ‘comparing’ are physical process steps . . .”<sup>80</sup> While specific guidance on how to identify a functional process claim was lacking, *Arrhythmia* at least provided several examples of the types of process steps the Federal Circuit considers to fall within the domain of § 112(6).

Similarly, there have been a handful of federal opinions which have had ample opportunity to expound upon the application of paragraph six to a process or method claim, but chose instead to remain silent. In 1969, the Court of Customs and Patent Appeals distinguished a process claim from an apparatus claim on the basis that the apparatus claim used “typical means-plus-function language” permitted under § 112(6).<sup>81</sup> This distinction was later referenced in *In re Donaldson*,<sup>82</sup> but the Federal Circuit maintained a neutral position regarding its validity.<sup>83</sup>

Most recently, in *Greenberg v. Ethicon Endo-Surgery, Inc.*,<sup>84</sup> the Federal

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Kayton & Karol S. Kayton eds., 5th ed. 1993). However, the accuracy of this statement is somewhat suspect due to the dearth of federal decisions regarding the application of paragraph six of § 112 to process claims.

73. 467 F.2d 295 (6th Cir. 1972), *cert. denied*, 411 U.S. 965 (1973).

74. *Id.* at 298.

75. *Id.* at 300.

76. 958 F.2d 1053 (Fed. Cir. 1992).

77. *Id.* at 1055.

78. *Id.* at 1060.

79. *Id.* at 1058-61.

80. *Id.* at 1059.

81. *In re Prater*, 415 F.2d at 1406. *But see In re Angstadt*, 537 F.2d 498 (C.C.P.A. 1976) (Although not directly addressing the issue, the court recognized that functional method claim language may also be sanctioned under paragraph six.).

82. 16 F.3d 1189 (Fed. Cir. 1994).

83. *Id.* at 1195 n.6; *see supra* note 68.

84. 91 F.3d 1580 (Fed. Cir. 1996).

Circuit implied that claims reciting the phrase “step for” would likely invoke paragraph six. The court stated that “[c]laim drafters conventionally use the preface ‘means for’ (or ‘step for’) when they intend to invoke section 112(6).”<sup>85</sup> While it appears that at least *some* federal courts have found process/method claims to fall within the purview of § 112(6), application of the statute has been sporadic and far from universal. In order to gain a better understanding of when § 112(6) is applicable to process claims and how it should be applied, the following areas will now be examined: Congressional intent behind passage of the statute, the past opinions and views of a prominent Federal Circuit judge, the USPTO’s revised patent examination guidelines, and a detailed statutory interpretation of paragraph six including all applicable federal case law.

#### *A. Congressional Intent Behind the Enactment of 35 U.S.C. § 112(6)*

Perceived Congressional intent is often relied upon by courts to give meaning to a statute which has never been judicially interpreted. Although frequently used as a means for statutory interpretation, indications of intent can be very difficult to locate and even harder to evaluate. One of the best sources for determining Congressional intent is through direct legislative history.<sup>86</sup> Alternate methods include looking at the judicial climate just prior to enactment of the statute, investigating Congress’ motive behind the passage of the legislation, and examining off-the-record comments made by congressional members which directly relate to the statute.<sup>87</sup> All of the aforementioned sources will be examined in order to better understand the intent of Congress in passing paragraph six (then paragraph three) of the 1952 Patent Act.

Unfortunately, the Congressional record relating to the passage of § 112(6) makes no direct reference to the treatment of process claims. However, as stated by an eight-man Patent Office Board of Appeals in *Ex Parte Ball and Hair*,<sup>88</sup> “the language of [the sixth paragraph] of Section 112 is thought to be so clear as not to require any resort to extrinsic evidence in connection with its interpretation.”<sup>89</sup> Similarly, the Supreme Court in *Diamond v. Chakrabarty*<sup>90</sup> established that “courts ‘should not read into the patent laws limitations and conditions which the legislature has not expressed.’”<sup>91</sup> The Federal Circuit approved of this approach in *In re Donaldson*,<sup>92</sup> stating that “[w]hen statutory interpretation is at issue, the plain and unambiguous meaning of a statute prevails in the absence of clearly

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85. *Id.* at 1583 (emphasis added).

86. See *infra* notes 88-94 and accompanying text.

87. See *infra* notes 95-114 and accompanying text.

88. 99 U.S.P.Q. 146 (Bd. App. 1953).

89. *Id.* at 148.

90. 447 U.S. 303 (1990).

91. *Id.* at 308 (quoting *United States v. Dubilier Condenser Corp.*, 289 U.S. 178, 199 (1933)).

92. 16 F.3d 1189 (Fed. Cir. 1994).

expressed legislative intent to the contrary.”<sup>93</sup> Therefore, in light of the absence of direct legislative history regarding the passage of paragraph six, the literal meaning of its language must serve as the primary guide in determining Congressional intent.<sup>94</sup>

Regarding the judicial climate immediately prior to the enactment of paragraph six, there were several federal decisions which denounced method claims as being overbroad and too “results oriented.” One such decision was the 1944 Supreme Court case of *Universal Oil Products Co. v. Globe Oil & Refining Co.*<sup>95</sup> *Universal Oil* involved a process patent covering the refining of oil, and specifically addressed why a precise description of each process step is so important when drafting process claims.<sup>96</sup> First, adequate disclosure of a claimed process is required “to enable one skilled in the art to practice the invention once the [patent] has expired.”<sup>97</sup> Second, a detailed description is “essential to warn the industry concerned of the precise scope of the [patent].”<sup>98</sup> The Court was essentially stating that process claims were in general conflict with the policies of the patent system<sup>99</sup> and would be upheld only if they recited sufficient detail.<sup>100</sup> This viewpoint parallels the language of § 112(6)<sup>101</sup> and may have been partially responsible for its enactment.

The Supreme Court’s *Halliburton* decision is universally recognized as the primary catalyst behind Congressional enactment of § 112(6).<sup>102</sup> The motivation behind passage of paragraph six was undoubtedly the Supreme Court’s ruling that prohibited use of means-plus-function language to describe “the most crucial

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93. *Id.* at 1192-93; *see* Hoechst Aktiengesellschaft v. Quigg, 917 F.2d 522, 526 (Fed. Cir. 1990); Mansell v. Mansell, 490 U.S. 581, 592 (1989).

94. See *infra* Part IV.D for a detailed statutory interpretation of paragraph six as it relates to process claims.

95. 322 U.S. 471 (1944); *see also* *In re Fuetterer*, 138 U.S.P.Q. 217, 222 n.11 (C.C.P.A. 1963) (noting that it was Congress’ intent to restore the law regarding broad functional language used in combination claims to its state prior to *Halliburton*).

96. *Universal Oil*, 322 U.S. at 484.

97. *Id.*

98. *Id.*

99. The policy of rewarding a patentee with a limited monopoly over his invention encourages public disclosure of newly developed technology and further dissuades the formation of trade secrets. *Id.*

100. *Id.*; *see also* General Elec. Co. v. Wabash Appliance Corp., 304 U.S. 364, 368 (1938); *Be ne v. Jeantet*, 129 U.S. 683, 685 (1889).

101. The statute states that “an element . . . may be expressed as a . . . step for performing a function without the recital of acts in support thereof, and such claim shall be construed to cover corresponding . . . acts described in the specification and equivalents thereof.” 35 U.S.C. § 112 (1994). The requirement for a “description of corresponding acts” within the specification is likely what the Court was looking for in its demand for a “precise description” of each process step.

102. *In re Donaldson*, 16 F.3d at 1194. *See generally* Charles J. Zinn, *Commentary on the New Title 35, U.S. Code “Patents,”* 1952 U.S.C.C.A.N. 2507, 2514 (for the proposition that paragraph six of § 112 was intended to address the *Halliburton* holding).

element" of a combination claim.<sup>103</sup> Specifically, the Court held that:

The language of the claim thus describes this most crucial element in the "new" combination in terms of what it will do rather than in terms of its own physical characteristics or its arrangement in the new combination apparatus. We have held that a claim with such a description of a product is invalid as a violation of [the patent statute].<sup>104</sup>

The Court's motive in holding that means-plus-function language was in violation of the Patent Act was an overwhelming fear that these types of claims were overbroad and ambiguous and that they posed a threat to the established policies and precedents of the patent system.<sup>105</sup>

Congress countered the *Halliburton* decision through the passage of § 112(6), reallowing the use of broad means-plus-function claim language. However, the statute provided a standard that limited the reach of such claims and made them more definite.<sup>106</sup> Congress undoubtedly saw some value in functional claim language where the Supreme Court did not, and chose to "[add] language to the Patent Act of 1952 to change the doctrine enunciated in *Halliburton Oil Well Cementing Co. v. Walker*."<sup>107</sup> This additional statutory language rendered *Halliburton* obsolete.

Congressional intent in passing § 112(6) was thus twofold. Congress chose to save functional claim language from prohibition by the Supreme Court, and at the same time elected to cut back the claim's scope of coverage to avoid situations where patent protection would be virtually unlimited and indefinite. Although *Halliburton* (and all subsequent decisions interpreting its holding) dealt with apparatus claims employing means-plus-function language, the analysis of Congressional intent would appear to apply equally to process claims using the step-plus-function claim format.

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103. *Halliburton*, 329 U.S. at 9; *see supra* note 37 and accompanying text.

104. *Halliburton*, 329 U.S. at 9.

105. *Id.* at 12 (stating that "[u]nder these circumstances the broadness, ambiguity, and overhanging threat of the functional claim of Walker became apparent"). Over four decades after *Halliburton* and the subsequent passage of paragraph six of § 112, the Court's fears were recently recognized as being legitimate. In *Laitram Corp. v. Rexnord, Inc.*, the Federal Circuit acknowledged that "[a]bsent section 112(6), claim language which requires only a means for performing a function might be indefinite." 939 F.2d 1533, 1536 (Fed. Cir. 1991); *see also* *Jonsson v. Stanley Works*, 903 F.2d 812, 819 (Fed. Cir. 1990); *Data Line Corp. v. Micro Techs., Inc.*, 813 F.2d 1196, 1201 (Fed. Cir. 1987).

106. The language of paragraph six of § 112 allows a patent applicant to express an element in a combination claim in terms of a means for performing a specified function without recital of structure, material or acts within the claim itself. However, the breadth of a means-plus-function claim is limited by the added stipulation that the applicant must describe some structure, material or act which performs the function somewhere within the patent's specification.

107. *Valmont Indus., Inc. v. Reinke Mfg. Co.*, 983 F.2d 1039, 1042 (Fed. Cir. 1993); *see also* *In re Donaldson*, 16 F.3d at 1194 (paragraph six enacted "to statutorily overrule" the *Halliburton* decision).

The intent of the Legislature in passing § 112(6) can also be gleaned from comments (made by members of Congress) directly relating to the statute. An address given by the Hon. Joseph R. Bryson<sup>108</sup> on January 24, 1952,<sup>109</sup> to the Philadelphia Patent Law Association directly addressed the passage of § 112(6), stating in part:

I should like to say a word on the provision in the bill for functional claiming. [H.R. 3760, 82d Cong., 1st Sess., § 112 (1951)] . . . . This provision in reality will give statutory sanction to combination claiming as it was understood before the Halliburton decision. *All the elements of a combination now will be able to be claimed in terms of what they do as well as in terms of what they are.*<sup>110</sup>

This brief comment illustrates that Congress likely intended that *all* elements of a combination claim may be expressed in terms of their intended function, which presumably includes those elements which describe the function of a process or method. Furthermore, if functional process claims are sanctioned by § 112(6), then they must necessarily adhere to the limitations imposed by the statute; namely the “narrowing effect” which limits a patent’s scope of coverage.<sup>111</sup>

Furthermore, P.J. Federico of the USPTO, who was instrumental in the drafting and passage of the 1952 Patent Act, commented that the word “combination” included “not only a combination of mechanical elements, but also a combination of substances in a composition claim, or *steps in a process claim . . .*”<sup>112</sup> Although the intent of a non-congressional member is usually irrelevant in cases of statutory interpretation,<sup>113</sup> the viewpoint of a person who had significant and direct input into the actual language of the statute and who

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108. Representative Bryson of South Carolina was the Chairman of Subcommittee No. 3 of the Judiciary Committee of the House of Representatives in charge of the legislation that ultimately resulted in the passage of the 1952 Patent Act.

109. Approximately six months prior to President Truman signing the proposed patent bill into law on July 19, 1952.

110. AMERICAN PATENT LAW ASSOCIATION BULLETIN, 45-46 (Feb. 1952) (emphasis and underscore added); *see also In re Fuetterer*, 138 U.S.P.Q. at 222 n.11.

111. Paragraph six limits the scope of process steps to the “acts described in the specification and equivalents thereof.” 35 U.S.C. § 112 (1994).

112. P.J. Federico, *Commentary on the New Patent Act*, 35 U.S.C.A. Vol. 1, 25-26 (1954) (emphasis added); *see also Proposed Revisions and Amendment of the Patent Laws, Preliminary Draft with Notes, January 10, 1950*, Committee in the Judiciary, House of Representatives (1954) (document is commonly referred to as the “Federico Draft” and contains an initial draft of the 1952 Patent Act as well as all pertinent revisionary notes).

113. The court in *In re Donaldson* stated that Federico’s commentary was “not legislative history per se that may be relied upon to indicate Congressional intent,” that the comments “do not suggest that Federico knew of any particular intent by Congress,” and “he was merely stating his personal views.” 16 F.3d at 1194 n.3. *But see Valmont*, 983 F.2d at 1042 (Interestingly, one year prior to *In re Donaldson*, the Federal Circuit relied on Federico’s commentary in interpreting the scope of paragraph six of § 112.).

was instrumental in its passage seems extraordinarily pertinent. In addition, some scholars consider Federico to have been an “agent” of Congress as he was one of only a handful of men responsible for the drafting of the Patent Act.<sup>114</sup> Regardless, based on his comments, it is clear that Federico believed process claims to be covered by § 112(6) in addition to mechanical elements expressed in functional claim language.

### *B. The Views of Federal Circuit Judge Rich*

In attempting to predict how a court may rule in an area which has never been litigated, it is helpful to examine the backgrounds of the most influential justices and analyze how their views and opinions may affect the yet undecided judicial issue. In the area of patent law, it is virtually indisputable that Federal Justice Rich is the most respected and influential member<sup>115</sup> of the Federal Circuit bench. Most notably, Judge Rich’s involvement in and contributions to the evolution of modern patent law has been recognized by both Congress<sup>116</sup> and the Supreme Court.<sup>117</sup>

As Judge Rich was one of the original drafters of the Patent Act, his views and opinions should carry great weight in the Federal Circuit’s ultimate decision regarding the application of § 112(6) to process claims. A strong indication of Judge Rich’s view on the pending issue was expressed in the 1963 decision of *In re Fuetterer*.<sup>118</sup> In deciding a case generally involving the use of means-plus-function language, Judge Rich (writing for the majority) stated that “[t]he word ‘combination’ in this paragraph<sup>119</sup> includes . . . ‘steps in a process claim.’”<sup>120</sup> He went on to add that this view was “fully supported by legislative history.”<sup>121</sup>

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114. *But see* C. SANDS, SUTHERLAND ON STATUTORY CONSTRUCTION § 49.09 (4th ed. 1984) (rule of implied adoption of agency interpretation does not apply where there is no evidence in the legislative history indicating that Congress’ attention was directed to such interpretation). *See also* General Am. Transp. v. Interstate Commerce Comm., 872 F.2d 1048, 1053 (D.C. Cir. 1989).

115. Judge Rich is well known for his five-year effort to revise the patent statutes. His dedication and expertise in this area of the law ultimately culminated in the passage of the 1952 Patent Act. Following enactment of the Patent Act, Judge Rich was appointed to the Court of Customs and Patent Appeals as the principal interpreter of the new law regarding patents. He was then appointed to his present seat on the Court of Appeals for the Federal Circuit, a position which he has held for over a decade. George E. Frost, *Judge Rich and the 1952 Patent Code—A Retrospective*, 76 JPTOS 343 (1994).

116. The House Committee report referencing passage of the Patent Act specifically identified and paid tribute to Judge Rich and others who “particularly devoted themselves to the work.” *Id.* at 3.

117. Aro Mfg. Co. v. Convertible Top Replacement, 377 U.S. 476, 486 n.6 (1964) (referencing the close involvement of Judge Rich in the development of the Patent Act).

118. 138 U.S.P.Q. 217 (C.C.P.A. 1963).

119. Referring to the current language of paragraph six of U.S.C. § 112.

120. *In re Fuetterer*, 138 U.S.P.Q. at 222 (emphasis added).

121. *Id.* Judge Rich was indicating his approval of the statements made by P.J. Federico in

Furthermore, in a 1952 address to the New York Patent Law Association, Judge Rich, in one of the most accurate and important explanations of the new Patent Act,<sup>122</sup> commented on the applicability of § 112(6) to functional claims. His lecture included the statement that a functional “element or step is to be construed—shall be construed (it is mandatory)—to cover the corresponding structure, material or acts described in the specification and equivalents thereof.”<sup>123</sup> Based on this statement, there is little doubt that Judge Rich’s treatment of a functional process “step” should be identical to that of an apparatus “means.” While Judge Rich may have clearly expressed his view regarding the general applicability of § 112(6) to process claims,<sup>124</sup> he gave no indication regarding the *types* of process claims that should be covered by the statute. Similarly, this issue has remained unsettled within the Federal Circuit as well.

### *C. The Patent and Trademark Office Examination Guidelines Regarding Process Claims*

Because the USPTO persistently refused to apply § 112(6) during the prosecution stage of a patent, considerable conflict arose between the USPTO and the Federal Circuit.<sup>125</sup> This forty-two year conflict was largely resolved through the *In re Donaldson* and *Alappat* decisions.<sup>126</sup>

In response to *In re Donaldson*, the USPTO issued revised Examination Guidelines<sup>127</sup> which announced the Office’s intent to follow the Federal Circuit’s mandate for exercising the provisions of § 112(6) when applicable.<sup>128</sup> Citing two examples, the USPTO has made it unmistakably clear that they would not only be applying § 112(6) to apparatus claims, but would be applying the provision to process claims as well. Specifically, the USPTO announced that the following types of claim limitations would fall within the scope of § 112(6): “[r]educing the coefficient of friction of the resulting film”<sup>129</sup> and “[r]aising the pH of the

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his commentary regarding the new Patent Act. *See supra* note 112 and accompanying text.

122. Frost, *supra* note 115, at 3 (attesting to the accuracy of this statement).

123. *Pennwalt Corp. v. Durand-Whayland, Inc.*, 833 F.2d 931, 933-34 (Fed. Cir. 1987) (emphasis added).

124. His point of view expressed in both on- and off-the-record comments.

125. *See supra* note 63 and accompanying text (for a discussion regarding a similar conflict between the USPTO and the Board of Patent Appeals).

126. *See supra* notes 58-70 and accompanying text.

127. Charles E. Van Horn, *PTO Notice on Means or Step Plus Function Limitation Under 35 U.S.C. Section 112, 6th Paragraph*, 47 PTCJ 571 (1994).

128. *Id.* at 1. The USPTO stated that “effectively immediately, examiners shall interpret a Section 112, 6th paragraph ‘means or step plus function’ limitation in a claim as limited to the specification and corresponding structure, materials or acts described in the specification and equivalents thereof . . . .” *Id.* (emphasis added).

129. *In re Roberts*, 470 F.2d 1399, 1400 (C.C.P.A. 1973) (also holding that, in a step-plus-function type claim, recital of a “specific step” is unnecessary to invoke § 112). *Id.* at 1403.

resultant pulp to about 5.0 to precipitate . . . .”<sup>130</sup> Both of these claim formats are typically used in the drafting of process and method claims.

Although the USPTO has not been explicit regarding the type of claim language required to satisfy the requirements of paragraph six, prior case law indicates what they might have in mind.<sup>131</sup> With regard to a process claim, in *Ex Parte Alappat*,<sup>132</sup> the Patent Office required that a step in a method specifically do something “physical.”<sup>133</sup> In *Ex Parte Akamatsu*,<sup>134</sup> the USPTO implied that method steps must be restricted to certain significant and essential processes.<sup>135</sup> As neither of these restrictions are expressly contained within the text of paragraph six, it will be up to the Federal Circuit to ultimately determine the exact requirements of the statute.<sup>136</sup>

Additionally, the USPTO indicated which types of apparatus and process claims would be subject to the “narrowing effect” of § 112(6) through comments made in its revised Examination Guidelines.<sup>137</sup> Although the USPTO guidelines state that there are no “magic words” necessary to invoke paragraph six,<sup>138</sup> “it must be clear that the element in the claim is set forth, at least in part, by the function it performs as opposed to the specific structure, material, or acts that perform the function.”<sup>139</sup> It is apparent that the USPTO will not be requiring use of the words “means” or “step” to engage § 112(6), but will merely be looking for language which is truly functional in nature.<sup>140</sup>

#### *D. Statutory Interpretation of 35 U.S.C. § 112(6)*

In light of the foregoing discussion, there seems to be persuasive evidence

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130. *Ex Parte Zimmerley*, 153 U.S.P.Q. 367, 368 (Bd. App. 1966) (holding that § 112 “sanctions functionally defined steps in claims drawn to a combination of steps”). *Id.* at 369.

131. It appears as though the USPTO may be treating the relationship between the terms “step” and “act” in much the same way that the federal courts have been treating the relationship between “means” and “structure.”

132. 33 F.3d 1526 (Bd. Pat. App. & Interferences 1992).

133. *Id.* at 1559. The USPTO questioned whether an algorithm was subject to paragraph six of § 112, primarily pointing to the fact that it was not “applied in any manner to *physical steps*” and that the “claim does not require *physical quantities*.” *Id.* (emphasis added).

134. 22 U.S.P.Q. 2d 1915 (Bd. App. 1992).

135. *Id.* at 1918. The Patent Office argued that “[t]he method claims do not wholly preempt these procedures, but limit their application to *defined process steps*.” *Id.* (emphasis added); *see also* Arrhythmia Research Tech., Inc. v. Corazonix Corp., 958 F.2d 1053, 1059 (Fed. Cir. 1992).

136. See *infra* Part IV.D for a detailed statutory interpretation of paragraph six of § 112 and a prediction on how the Federal Circuit may ultimately interpret the statute’s requirements with regard to process claims.

137. Van Horn, *supra* note 127.

138. *Id.* at 2. Presumably referring to the classical “means for” and “step for” claim language.

139. *Id.*

140. See *infra* notes 173-93 and accompanying text (for a discussion on the requirements of functional claim language).

that paragraph six applies to process claims. While there have been no Federal Circuit decisions expressly stating this conclusion, the original intent of Congress,<sup>141</sup> the viewpoint of a prominent Federal Circuit judge,<sup>142</sup> and the revised Examination Guidelines of the USPTO<sup>143</sup> strongly attest to its accuracy. Although many scholars and practitioners agree with the general proposition that § 112(6) is applicable to functional process language, it is debatable as to what types of process claims fall within its grasp. Just as all functional apparatus claims (using “means-plus-function” language) are not limited by paragraph six,<sup>144</sup> it is quite likely that all functional process claims (which use “step-plus-function” language) do not universally fall within the statute’s coverage.

In order to determine whether § 112(6) is applicable to a process or method claim, each provision of paragraph six must be closely examined. Specifically, the statute provides that “[a]n element in a claim for a combination may be expressed as a . . . step for performing a specified function without the recital of . . . acts in support thereof . . . .”<sup>145</sup> A literal reading indicates that four requirements must be satisfied before the statute will apply.

1. *Requirement for a Combination Claim.*—The first requirement of § 112(6) stipulates that the element in question must be part of a “claim for a combination.”<sup>146</sup> With regard to an apparatus claim, a combination requires that the claim recite more than a “single means.”<sup>147</sup> Although never addressed by the federal courts, it seems logical that a process combination claim would, analogously, require more than a “single step.” Therefore, any process claim which recites two or more steps will likely be considered a combination claim and may be subject to paragraph six if the remaining statutory requirements are satisfied.

2. *Expression of a Step For Performing a Specified Function.*—Since the second and third requirements of § 112(6) are somewhat interdependent, they will be analyzed concurrently. Paragraph six states that a claim element may be expressed in terms of a “step”<sup>148</sup> and that this step may be described in terms of a “specified function.”<sup>149</sup> The precise meanings behind the terms “step” and “function” cannot be found in the legislative history of the Patent Act, nor have they ever been expressly defined by the Federal Circuit.<sup>150</sup> In fact, there have

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141. See *supra* Part IV.A.

142. See *supra* Part IV.B.

143. See *supra* Part IV.C.

144. See *infra* notes 166-69, 190-93, 206-10, 216-23 and accompanying text.

145. 35 U.S.C. § 112 (1994). For a detailed interpretation of paragraph six of § 112 statutory languages, see LAWRENCE B. GODWIN, COMPUTER PATENT TRIAL ISSUES, ch. 13 (1995).

146. 35 U.S.C. § 112 (1994).

147. *In re Hyatt*, 708 F.2d 712, 715 (Fed. Cir. 1983).

148. 35 U.S.C. § 112 (1994).

149. *Id.*

150. Perhaps much of the confusion and ambiguity surrounding functional process claims stems from the lack of sufficient statutory definitions for the terms “step,” “function,” and “acts.” All of the words would seem to have very similar meanings and connotations. As early as 1963,

been only three federal cases in the past thirty years which have shed substantial light on this issue.<sup>151</sup>

In *Ex Parte Zimmerley*,<sup>152</sup> the Board of Appeals held that an element reciting the language “[r]aising the pH of the resultant pulp to about 5.0 to precipitate dissolved molybdenum as molybdenum trihydroxide”<sup>153</sup> fell within the grasp of § 112(6).<sup>154</sup> Although never explicitly stated, the Board presumably treated the phrase “raising the pH of the resultant pulp” as the step and the phrase “to precipitate dissolved molybdenum . . .” as the step’s function. In support of its holding, the Board asserted that paragraph six “sanctions functionally defined steps in claims drawn to a combination of steps.”<sup>155</sup>

In *In re Roberts*,<sup>156</sup> the Court of Customs and Patent Appeals found that the following claim was expressed in functional language and was sanctioned by paragraph six: “reducing the coefficient of friction of the resulting film to below about 0.40 . . .”<sup>157</sup> As the court did not give a detailed analysis of the reasoning behind its holding, it is difficult to say what portion of the claim was treated as the step and which part was considered the function. While the reduction of the coefficient of friction seems, at least on its face, to be a step in an overall process, there is no function expressed within the claim which is performed by this step.<sup>158</sup> Alternately, the reduction of the coefficient of friction may have been considered the function of the *unexpressed* step of applying a lubricant to the film or mechanically treating the film’s surface to make it smoother (e.g. by sandblasting). Regardless of the rationale used by the court, it found the claim language to fall within § 112(6),<sup>159</sup> thus adding to the uncertainty surrounding process claims and the application of paragraph six.

Although neither *Ex Parte Zimmerley* nor *In re Roberts* used the term “step” within the language of their respective claims, based on prior decisions regarding functional means claims, this does not appear to be necessary to invoke § 112(6). In *Ex Parte Stanley*,<sup>160</sup> the Patent and Trademark Office Board of Appeals held that the term “device” was synonymous with the term “means” and “[a]ccordingly, the term ‘device’ coupled with a function is a proper definition of structure and is therefore within the requirements of 35 U.S.C. § 112, last

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lack of definition for the term “functional” was recognized as the primary source of confusion surrounding paragraph six. *In re Fuetterer*, 138 U.S.P.Q. 217, 221 n.9 (C.C.P.A. 1963).

151. One of these cases being the *Noll* decision discussed *supra* in notes 73-75 and accompanying text.

152. 153 U.S.P.Q. 367 (Bd. App. 1966).

153. *Id.* at 368.

154. *Id.* at 369.

155. *Id.*

156. 470 F.2d 1399 (U.S.P.Q. 1973).

157. *Id.* at 1400.

158. See *infra* notes 189-93 and accompanying text (for a discussion regarding the requirement for an expressed function under paragraph six).

159. *Roberts*, 470 F.2d at 1400.

160. 121 U.S.P.Q. 621 (Bd. App. 1958).

paragraph.”<sup>161</sup> Apparently, mere replacement of the term “means” with a generic term such as “device” or “element” will not affect the ultimate application of paragraph six. Accordingly, in *Bryan v. Sid W. Richardson, Inc.*,<sup>162</sup> the Fifth Circuit stated that the word “means” or “its equivalent synonyms” could be used interchangeably and the claim would still fall within the domain of paragraph six.<sup>163</sup> The Ninth Circuit has put forth a similar proposition, indicating that certain generic terminology might meet the requirements of § 112(6) if the terms used are basically substitutes for the term “means.”<sup>164</sup> Even the USPTO has rejected the argument that only the word “means” will invoke the statute.<sup>165</sup>

It appears as if the Federal Circuit has retracted somewhat from the general proposition that words other than “means” can be used to invoke § 112(6). In *Greenberg v. Ethicon Endo-Surgery, Inc.*,<sup>166</sup> the court indicated that even though paragraph six does not require use of the word “means” as a triggering mechanism, the term “has come to be so closely associated with ‘means-plus-function’ claiming that it is fair to say that the use of the term ‘means’ (particularly as used in the phrase ‘means for’) generally invokes section 112(6) and that use of a different formulation generally does not.”<sup>167</sup>

In what would seemingly be minority opinions, a few federal cases have held that the term “means” *must* be used in order to invoke paragraph six. In *Ex Parte Roggenburk*,<sup>168</sup> use of the term “means” was held to be essential to invoke the statute.<sup>169</sup> At least one commentator, expressing his perspective on the use of

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161. *Id.* at 627. The claim specifically called for “a jet driving device so construed and located on the rotor as to drive the rotor at a blade tip speed of the order of 680 to 760 per second.” *Id.* at 622. The court stressed that “[t]he addition of the phrase ‘jet driving’ to the term device merely renders the latter term more definite and specific.” *Id.* at 628.

162. 254 F.2d 191 (5th Cir. 1958).

163. *Id.* at 194; *see also* *Haney v. Timesavers, Inc.*, 29 U.S.P.Q. 2d 1605, 1609 (D. Or. 1993) (holding the term “mechanism” synonymous with the term “means”); *Application of Attwood*, 354 F.2d 365, 374 (C.C.P.A. 1966) (holding that a means-plus-function claim was subject to § 112 and should not have been ignored by the Board below even though the term “means” was not used within the claim).

164. *Kockum Industries, Inc. v. Salem Equipment, Inc.*, 467 F.2d 61 (9th Cir. 1972), *cert. denied*, 411 U.S. 964 (1973) (The phrases “debarking portion” and “log-impactable edge” were found to fall within § 112.).

165. *See* 1162 O.G. 59 n.2 (May 17, 1994).

166. 91 F.3d 1580 (Fed. Cir. 1996).

167. *Id.* at 1584.

168. 172 U.S.P.Q. 82 (Bd. App. 1970).

169. *Id.* (specifically finding that paragraph six “applies expressly only to limitations involving the term ‘means’ and the recitation of a specified function performed by the ‘means’”); *see also* *Technitrol, Inc. v. Control Data Corp.*, 550 F.2d 992, 999 (4th Cir. 1977) (court implied that use of the term “means” within a functional apparatus claim was necessary to be considered a means clause). *But see Waterloo Furniture Components, Ltd. v. Haworth, Inc.*, 798 F. Supp. 489, 494 (N.D. Ill. 1992) (holding that “the use of the word ‘means’ in a claim does not as a matter of law refer to an element expressed in means-plus-function form”).

functional language within the area of the mechanical arts, has reached this same conclusion.<sup>170</sup>

Just as means-plus-function claims can use language interchangeable with the word "means" and still fall within the confines of § 112(6), it is logical to assume that terms synonymous with "step" can be used in step-plus-function claims and reach the same result.<sup>171</sup> Thus, words such as "phase," "stage," "procedure," or any other generic term which conveys the same general meaning can theoretically be used interchangeably with term "step" without effecting the application of paragraph six. If the foregoing statement were not true, it would be exceedingly easy for an applicant to avoid § 112(6) by merely avoiding use of the term "step." This surely was not the Congressional intent behind passage of the statute.<sup>172</sup>

Similar to the lack of definition for the terms "means" and "step," there is also ambiguity surrounding the term "function." There are two primary questions associated with the functional requirement of § 112(6): (1) What terminology is required within the claim to signify a function? and (2) Does a function need to be recited at all?

Although the requirement for a recited function in a step-plus-function claim may seem elementary, identifying the functional element can sometimes be an exceedingly difficult endeavor. The only federal decision which has even remotely dealt with identification of the function within a method claim is *In re Cohn*.<sup>173</sup> The Court of Customs and Patent Appeals held that a method step, pursuant to § 112(6), can be recited as doing something "until" a particular result occurs, provided the result can be duplicated by a person skilled in the art.<sup>174</sup> The court in *Cohn* seems to be stating the obvious, as most process steps are executed "until" a desired outcome is achieved. However, the court's holding may alternately stand for the proposition that only those process steps which are truly "result-oriented" and adequately defined within the specification will be subject to the effects of paragraph six.<sup>175</sup> If true, the function of a process claim can best

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170. See generally Jeffrey G. Sheldon, "Means" Clauses, in ABA IPL SECTION, 1995 ANNUAL SUMMER CONFERENCE, at 402-04 (1995) (giving examples on how to broaden a claim through the use of generic structural language rather than standard means clauses, e.g., using "a fastener" vs. "means for fastening" or using "a heater" vs. "means for heating").

171. *In re Roberts* implied that terms synonymous with "step" could be used interchangeably based on the court's statement that recital of a "specific step" may be unnecessary to invoke paragraph six. 470 F.2d at 1403.

172. See *Laitram Corp. v. Rexnord, Inc.*, 939 F.2d 1533, 1538 (Fed. Cir. 1991) (ruling that it should not approve of a "convenient way of avoiding the express mandate of section 112(6)").

173. 438 F.2d 989 (C.C.P.A. 1971).

174. *Id.* at 991. The court's condition that the result must be capable of "duplication by a person skilled in the art" is presumably referencing paragraph six's specific demand for "acts described in the specification."

175. For example, the claim "heating solution A until it comes to a boil" is result-oriented, whereas "mixing solution A with solution B" is probably not. Perhaps only those process claims which recite a resulting function directly relating to the process step will fall within the scope of paragraph six of § 112. See *infra* notes 189-93 and accompanying text (for a discussion regarding

be identified by attempting to isolate and define the "result" of the recited process step.

While there has been only one judicial opinion giving insight on how to identify the function of a process claim, there have been numerous cases dealing with identification of the function within an apparatus claim. Probably the most universally used technique for indicating a function is through use of the word "for."<sup>176</sup> There are, however, other frequently used words or phrases which depict the same meaning as the term "for" including "as to" (or "to"),<sup>177</sup> "which,"<sup>178</sup> or "so that."<sup>179</sup> As a general rule, a phrase can usually be identified as a function if it depicts "what the [means] *does*, not what it *is* structurally."<sup>180</sup> A similar rule likely applies to claims expressed in the step-plus-function format.<sup>181</sup>

While identification of the function in a majority of claims is fairly straightforward, there are cases where the function has been disguised as a simple means clause. For example, in *Ex Parte Klumb*,<sup>182</sup> the phrase "means for printing" was found to be functionally equivalent to "printing means"<sup>183</sup> and both phrases were held to fall within the purview of § 112(6).<sup>184</sup> The Board asserted that "we see no necessity for construing the statute to require a particular grammatical construction, so long as the modifier of that term specifies a function to be performed."<sup>185</sup> Accordingly, in *Fairchild Semiconductor Corp. v. Nintendo Co.*,<sup>186</sup> the court implied that use of the term "for" was not essential to trigger the

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the statutory requirement for reciting a function).

176. For example, "a valve means for restricting flow", "a processing means for computing," or "a sensing means for detecting seat occupancy." *See, e.g.*, *Intellical Inc. v. Phonometrics, Inc.*, 952 F.2d 1384 (Fed. Cir. 1992). Other words interchangeable with "for" include "whereby" and "thereby."

177. For example, "a valve means employed as to restrict flow," "the step of welding to securely fasten two plates together," or "heating said mixture to form a slurry." *See, e.g.*, *De Graffenreid v. United States*, 16 U.S.P.Q. 2d 1321 (Ct. Cl. 1990) (holding the phrase "adapted to" to be synonymous with the term "for"); *Ex Parte Stanley*, 121 U.S.P.Q. 621, 627 (Bd. App. 1958).

178. For example, "a valve means which restricts flow" or "the step of heating a fluid which brings the fluid to a boil."

179. For example, "a valve means used so that flow is restricted." *See, e.g.*, *Raytheon Co. v. Roper Corp.*, 724 F.2d 951, 957 (Fed. Cir. 1983), *cert. denied*, 469 U.S. 835 (1984) (finding functional means language introduced by the phrase "so that" to be covered under paragraph six).

180. *Laitram*, 939 F.2d at 1536.

181. A phrase in a process claim will presumably be considered a function if it depicts what the step *does* instead of merely describing *acts* which further define the step.

182. 159 U.S.P.Q. 694 (Bd. App. 1967).

183. *Id.* at 695 (comparison of the claim formats was made in dicta). The Board also suggested that the phrase "means for latching" was equivalent to "latching means." *Id.*

184. *Id.*

185. *Id.*

186. 30 U.S.P.Q. 2d 1657 (W.D. Wash. 1994).

narrowing effect of paragraph six.<sup>187</sup> Although never explicitly stated in a judicial opinion, common sense indicates that an applicant should not be able to avoid the effects of § 112(6) by simply disguising the function of a claim in terms of its corresponding means or step.<sup>188</sup>

Another issue surrounding the functional requirement of paragraph six deals with the question of whether a function is required at all. The Patent Act clearly sanctions that an element “may be *expressed* as a . . . step for performing a *specified function* . . .”<sup>189</sup> However, it is unclear whether the term “expressed” exclusively modifies the term “step,” or if both the “step” and the “specified function” must be dually expressed within the language of the claim. This issue was initially raised in *Waterloo Furniture Components, Ltd. v. Haworth, Inc.*<sup>190</sup> in a means-plus-function context and the Northern District of Illinois held that “the claim language [did] not specify a function”<sup>191</sup> and the claim elements were therefore not “means-plus-function elements.”<sup>192</sup> Consequently, the claims were “not subject to the restrictions of 35 U.S.C. § 112, para. 6.”<sup>193</sup> Hence, it appears that before § 112(6) will take affect, a function, whether it be expressed or implied, must be present within the claim.

3. *Non-Recitation of Supporting Acts.*—The third requirement of paragraph six is actually a negative requisite as it stipulates that a functional process element need *not* recite the acts for performing the specified function. Once again, there have been no federal opinions expressly defining the term “acts,” so decisions interpreting the meaning behind “structure” and “material” must be used as general interpretive guides. Furthermore, as this statutory requirement demands inaction (i.e. lack of recitation of acts in support of the functional claim), if action is in fact taken (i.e. adequate recitation of the acts) paragraph six

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187. *Id.* at 1660. The patent at issue covered equipment for a home video game, and specifically claimed a “locking means having a detent . . .” *Id.* The court found the phrase “locking means” to be functional because it referred to “a way for a device to lock.” *Id.*

188. *See supra* note 172 and accompanying text.

189. 35 U.S.C. § 112 (1994) (emphasis added).

190. 798 F. Supp. 489 (N.D. Ill. 1992).

191. *Id.* at 494-95. The claims at issue specifically covered a “first means positioned under said primary support and mounted on said carriage means” and a “second means mounted on said auxiliary support and positioned below the underside thereof.” *Id.* at 491. The court indicated that neither of these claim elements explicitly recited the function of the means, but merely indicated the relative location of the means. *Id.* at 495.

192. *Id.* at 496. The court stated that mere use of the word “means” within a claim “does not as a matter of law refer to an element expressed in means-plus-function form.” *Id.* at 494. The clear implication is that “something else” is required in addition to the means (i.e. an expressed or implied function). *See also* *Ex Parte Klumb*, 159 U.S.P.Q. 694, 695 (Bd. App. 1967) (The Board held that the word “means” in a means-plus-function clause must be followed by functional language in order for paragraph six to apply. Although never explicitly stated, the rationale for this opinion may possibly lie in a statutory interpretation of § 112 which finds the word “expressed” to modify the phrase “specified function” in addition to the term “means.”).

193. *Waterloo*, 798 F. Supp. at 496.

may possibly be rendered inapplicable. The degree or amount of recitation necessary within a process claim to avoid the narrowing effect of paragraph six may also be at issue if acts supporting the process step are not described with sufficient precision and clarity.

The watershed decision regarding the forth requirement of § 112(6) is *Laitram Corp. v. Rexnord, Inc.*<sup>194</sup> The primary issue was whether the patentee's claim recited sufficient structure to avoid the narrowing effect of paragraph six. The claim was expressed in terms of a "means for joining said pluralities [of link ends],"<sup>195</sup> but failed to recite additional structure or material giving further definition to the means used. The claim did, however, further define the *function* accomplished by the means (i.e. joining of the link ends). The Federal Circuit held the claim subject to § 112(6) because "[t]he recitation of some structure in a means plus function element does not preclude the applicability of section 112(6)."<sup>196</sup> The court went on to explain that the structural description in the claim merely served to further specify and define the function of the recited means<sup>197</sup> and that "[t]he recited structure tells only what the means-for-joining *does*, not what it *is* structurally."<sup>198</sup> The court ultimately found paragraph six to apply and the patent's scope of protection was narrowed to cover only the corresponding structure described in the specification (and its equivalents).<sup>199</sup>

There are two relevant rules of law to be gleaned from *Laitram*. First, the court defined, albeit vaguely, the amount of recitation of supporting structure, material or acts necessary to avoid application of § 112(6).<sup>200</sup> Second, the court determined that the required recitation must further define the means or step, and may not merely give further definition to the function.<sup>201</sup> Both of these rules outline important aspects of paragraph six and will now be examined in greater detail.

The court in *Laitram* specifically pointed out that "[t]he recitation of *some* structure in a means plus function element does not preclude the applicability of section 112(6)."<sup>202</sup> While a precise definition of "some" structure is lacking, the

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194. 939 F.2d 1533 (Fed. Cir. 1991).

195. *Id.* at 1535. The claim specifically covered a "means for joining said pluralities of [link ends] to one another so that the axes of said holes of said first plurality are arranged coaxially, the axes of said holes of said second plurality are arranged co-axially and the axes of respective holes of both pluralities of link ends are substantially parallel." *Id.*

196. *Id.* at 1536.

197. *Id.*

198. *Id.* To the contrary, the District Court found that the means-plus-function claim did not fall within paragraph six because it recited sufficient structure. Consequently, the claim was not narrowly construed to cover only the corresponding structure described in the specification. *Id.* 1535-36.

199. *Id.* at 1539. *Laitram's* patent was narrowly construed in light of paragraph six of § 112 and was therefore found not to be infringed by the *Rexnord* device. *Id.*

200. See *infra* notes 202-03 and accompanying text.

201. See *infra* notes 204-05 and accompanying text.

202. *Laitram*, 939 F.2d at 1536 (emphasis added).

very fact that the court specified the degree or amount of structure necessary to by-pass paragraph six implies that if sufficient structure *is* recited, the claim will not fall within the realm of the statute.<sup>203</sup> Although *Laitram* dealt with the interpretation of a mean-plus-function claim, its legal analysis should apply equally as well to claims expressed in a step-plus-function format. Accordingly, the recitation of *some* acts in a step-plus-function claim will likely not avoid application of § 112(6). On the other hand, if sufficient acts are recited in support of the functional step, the statute might be held inapplicable.

The court in *Laitram* also noted that although there was recitation of some structure within the means-plus-function claim, it “merely serve[d] to further specify the function of [the] means” and “tells only what the means-for-joining *does*, not what it *is* structurally.”<sup>204</sup> The court found that the recitation of structure within the claim defined the structural relationship between the elements comprising the function, but failed to adequately define the means used to accomplish the intended function.<sup>205</sup> Thus, what may initially appear to be recitation of structure within a claim may actually be an additional functional statement which will not prevent the application of paragraph six.

In 1996, the Federal Circuit identified terminology which is *inherently descriptive* of structure and would therefore escape the effects of § 112(6). In *Greenberg v. Ethicon Endo-Surgery, Inc.*,<sup>206</sup> a patent claim for a surgical instrument provided for a “detent mechanism defining the conjoint rotation of

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203. See *Quantum Corp. v. Mountain Computer Inc.*, 5 U.S.P.Q. 2d 1103 (N.D. Cal. 1987). The court held that § 112 was inapplicable because the claim “specifically provides a means to carry out the function . . . .” *Id.* at 1106-08. The claim at issue provided for a “correction signal generator means connected to said sample and hold circuit for generating an offset signal for application to said driver means to promote and maintain track centerline alignment.” *Id.* The amount of recited structure was found to be sufficient to remove the claim from § 112. *Id.* *But see* *Haney v. Timesavers Inc.*, 48 F.2d 1236 (Fed. Cir. 1995) (holding that the following mean-plus-function claim failed to recite “some” structure, thus finding § 112 applicable: “a double-drive mechanism interposed between and connecting the platen and frame, where the double drive mechanism imparts at least one translational orbital movement superimposed on another movement . . . ”); *Fairchild Semiconductor Corp. v. Nintendo Co.*, 30 U.S.P.Q. 3d 1657, 1660 (W.D. Wash. 1994) (holding that a claim for a “locking means having a detent for engaging said locking recess of said cartridge means . . . ” did not recite sufficient structure because “[w]hile the words of the claim embody some structural description (e.g. ‘a detent’), a person of ordinary skill in the art would read the language as a means element”); *Intellicall, Inc. v. Phonometrics, Inc.*, 952 F.2d 1384, 1388-89 (Fed. Cir. 1992) (The court determined that a claim covering a “call cost register means, including a digital display for providing a substantially instantaneous display . . . ” did not recite sufficient structure. While “digital display” appears to further define/support the “call cost register means,” the court treated the digital display as being a means in and of itself, therefore requiring further definition of the display means before § 112 could be by-passed.).

204. *Laitram*, 939 F.2d at 1535-36.

205. *Id.*; *see supra* note 195 (for the exact language of the claim).

206. 91 F.3d 1580 (Fed. Cir. 1996).

said shafts . . . .”<sup>207</sup> The court in *Greenberg* held that this phrase did not constitute means-plus-function language within the meaning of the Patent Act because, although the mechanism was defined in functional terms, the term “detent” (denoting the name for a structure) “has a reasonably well understood meaning in the art.”<sup>208</sup> Accordingly, all words used in conjunction with the term “means” might not automatically be in proper means-plus-function format. For example, commonplace structural terms such as “sensor” or “container,” which recite sufficient structure in and of themselves, might avoid application of § 112(6).<sup>209</sup> Although the court in *Greenberg* did not elaborate on the rationale behind its holding, it is suspected that it wanted to avoid the requirement that a patent specification become a “catalogue of existing technology.”<sup>210</sup>

As previously discussed, the legal analysis of *Laitram* (interpreting “means-for” language) can reasonably be used to evaluate step-plus-function claims. If the recited “acts” within a process claim merely serve to further specify/define the function of a process “step,” without giving further definition or support to the step itself, application of paragraph six will likely not be avoided. It appears that the only circumstance under which a process claim will side-step the narrowing effect of § 112(6) is when the claim is expressed in language defining the specific acts necessary to accomplish the process step, and not merely a well-defined description of the resulting function.

It is not entirely clear how the *Greenberg* holding will apply to process claims. Presumably, functional process terms which have a “reasonably well understood meaning in the art”<sup>211</sup> may escape the application of paragraph six. For example, process terms such as “drilling” or “welding,” which have meanings generally understood by persons engaged in the mechanical arts, may recite sufficient acts in and of themselves to avoid § 112(6). Conversely, terms such as “sensing”<sup>212</sup> or “cutting,”<sup>213</sup> which call to mind several methods which could be successfully used to satisfy their functional requirement, would likely fall within the scope of the statute.

4. *Corresponding Acts Described in the Specification.*—If all three of the previously discussed requirements of § 112(6) are satisfied, the result will be a

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207. *Id.* at 1582.

208. *Id.* at 1583. The term “detent” denotes a generally understood meaning within the mechanical arts. *Id.*

209. The *Greenberg* opinion cited many other devices which take their names from the functions they perform, such as “filter,” “brake,” “clamp,” “screwdriver,” “lock,” and “cutters.” *Id.* Presumably, use of these specific terms in conjunction with typical means-for language would avoid application of paragraph six.

210. Van Horn, *supra* note 127; *see also* Hybritech Inc. v. Monoclonal Antibodies, Inc., 802 F.2d 1367, 1384 (Fed. Cir. 1986) (patent specification need not teach, and preferably omits, what is well known in the art).

211. *Laitram*, 939 F.2d at 1538.

212. The step of “sensing” can be accomplished in a number of ways, including the use of mechanical switches, infra-red sensors, motion detectors, etc.

213. The step of “cutting” can be accomplished through sawing, torching, by laser, etc.

validly written process claim couched in statutory step-plus-function language. There is, however, an added stipulation that must be satisfied before the claim will be allowed by the USPTO or upheld in a federal court. Despite the sanctioning of qualified process claims under paragraph six, the patent's specification must also be examined to determine if it sufficiently describes corresponding acts for performing the claimed process steps.

The second clause of paragraph six mandates that "such claims shall be construed to cover the corresponding . . . acts described in the specification and equivalents thereof."<sup>214</sup> Although this clause is ordinarily considered a limitation on the reach of § 112(6), it may alternately be viewed as an additional statutory requirement. If an applicant is successful in satisfying the threshold requirements of the statute, but fails to adequately disclose supporting acts within the specification, the claim will either be disallowed during prosecution<sup>215</sup> or will be struck down in a patent infringement action.

As with the other statutory elements of § 112(6), judicial interpretation of the second clause of paragraph six has primarily centered around apparatus claims employing means-plus-function language. Once more, these opinions are the Federal Circuit's sole indication on how they might interpret process claims utilizing the step-plus-function format. Most recently, the Federal Circuit expressed its opinion in *In re Donaldson*,<sup>216</sup> noting that an applicant's failure to adequately disclose structure in the specification may lead to the disallowance of a means-plus-function claim limitation.<sup>217</sup> The court specifically stated:

If one employs means-plus-function language in a claim, one must set forth in the specification an adequate disclosure showing what is meant by that language. If an applicant fails to set forth an adequate disclosure, the applicant has in effect failed to particularly point out and distinctly claim the invention . . .<sup>218</sup>

Presumably, if an applicant uses step-plus-function language in a claim, but fails to sufficiently disclose corresponding acts within the specification which give

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214. 35 U.S.C. § 112 (1994).

215. Contrarily, the USPTO has implied that lack of disclosure of structure, material or acts within the specification will *not* prevent the examiner from interpreting the scope of a functional means or step plus-function claim and will not lead to an automatic disallowance. Van Horn, *supra* note 127. Additionally, the USPTO has stated that "[i]f no definition is provided [in the specification], some judgment must be expressed in determining the scope of the limitation." *Id.* It appears that the USPTO may once again be interpreting paragraph six in a manner inconsistent with the view of the Federal Circuit.

216. 16 F.3d 1189 (Fed. Cir. 1994).

217. *Id.* at 1195; *see also In re Hays Microcomputer Products, Inc.*, 982 F.2d 1527 (Fed. Cir. 1992) (holding that the patent's specification adequately disclosed the structure and materials necessary to depict the meaning behind a means for detecting a predetermined sequence of data signals and causing a modem to switch modes of operation, therefore satisfying the requirements of paragraph six).

218. *In re Donaldson*, 16 F.3d at 1195.

further definition to the process step, the claim may be held invalid and unenforceable.<sup>219</sup>

Additionally, in *Texas Instruments v. United States*,<sup>220</sup> the Federal Circuit stipulated that "patentees are required to disclose in the specifications some enabling means for accomplishing the functions set forth in the 'means-plus-function' limitation."<sup>221</sup> Likewise, in *Valmont Industries*,<sup>222</sup> the court held that "[t]he applicant must describe in the patent specification some structure which performs the specified function."<sup>223</sup>

The reasoning behind the foregoing decisions seems to be that if federal courts are to apply the second clause of § 112(6) to highly functional claims, there must be specific disclosure which further defines vague and indefinite claim language. Absent sufficient disclosure, the claim's scope of protection will be indeterminate and will not be sufficiently understood and interpreted by the court and, ultimately, by the patentee's competitors.<sup>224</sup> It appears clear that a specification which discloses the corresponding acts of a process step in vague, ambiguous and non-specific terms may, at first glance, seem to provide very broad patent coverage. However, if the final stipulation of paragraph six is not met, there will be a total lack of protection.<sup>225</sup>

## V. EPILOGUE

Almost forty-five years have passed since the enactment of the 1952 Patent Act. Although the chief purpose of the statute was to clear up confusion and ambiguity surrounding the field of patent law, with regard to 35 U.S.C. § 112(6), this purpose seems to have failed. It is nothing less than remarkable that four and one-half decades have passed without the emergence of judicial guidance concerning how (or if) paragraph six applies to process or method claims. In light of the Federal Circuit's recent interest in functional claim language,<sup>226</sup> it

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219. Accordingly, a practitioner drafting a functional process claim would be well advised to adequately describe in the specification, through the use of broad (yet specific) language, the corresponding acts which further define and expound upon the process step at issue.

220. 805 F.2d 1558 (Fed. Cir. 1986).

221. *Id.* at 1564.

222. 983 F.2d 1039 (Fed. Cir. 1993).

223. *Id.* at 1042.

224. If the claims of a patent are unclear, there are two resulting problems which may surface. First, the chance for resulting litigation will likely be increased because neither party is exactly sure where the scope of patent coverage begins and ends. Second, there is the possibility that technology will be stifled due to the broadness and indefiniteness surrounding unspecific claim language. See *supra* note 38 and accompanying text (for a discussion regarding the effect vague claim language may have on the continued development of technology).

225. True functional claims which do not meet every requirement of § 112 are not sanctioned under the Patent Act and will likely be held void for being indefinite.

226. In 1994, the Federal Circuit, sitting en banc, decided the cases of *In re Donaldson* and *In re Alappat*. See *supra* notes 58-70 and accompanying text. Although these decisions cleared

seems imminent that long awaited direction is forthcoming.

Comments and views put forth by Congress, members of the judiciary, and the USPTO all seem to indicate that § 112(6) does in fact apply to step-plus-function language. While there may be universal consensus that paragraph six applies to certain process/method claims, the real question focuses on what types of process claims will be subjected to the statute's "narrowing effect." Due to the dearth of federal decisions directly addressing this issue, identification of the circumstances under which paragraph six will apply is difficult, but not impossible. Guidance as to what constitutes a step-plus-function claim element can be largely derived from a close examination of § 112(6) and an analysis of case law which has already interpreted and construed analogous means-plus-function language.

A close reading of § 112(6) indicates that a patentee is afforded the option of expressing an element in a combination claim in terms of a "step." This would seemingly apply to the type of language typically found in the description of a process or method. Likewise, the statute states that the claim need not recite "acts" in support thereof, also appearing to reference process terminology. The resulting issue then is whether the patentee, through the selection of certain claim language, has chosen to invoke paragraph six. The prudent practitioner must therefore exercise great care in his choice of words. Regardless of whether § 112(6) is intended to be invoked or avoided, the precise definitions and requirements of the terms "step," "function," and "act" must be thoroughly understood. The practitioner must also be conscious of the fact that the location where he recites the details (i.e. the "acts") associated with a process step<sup>227</sup> will have great influence on the ultimate application of paragraph six.<sup>228</sup>

Additionally, practitioners must be aware that they can not escape the effects of § 112(6) by simply disguising their process claims in terms of analogous structural language. In light of the fact that virtually any process claim can be easily converted into a look-alike apparatus claim by a skilled practitioner,<sup>229</sup> to limit one format under § 112(6) and not the other would result in a non-uniform rule denoting form without substance. This is surely what the Federal Circuit was referring to when it stated that it should not condone "a convenient way of

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up the turmoil and chaos surrounding the use of means-plus-function claim language, they did little to resolve the remaining issues concerning the step-plus-function language used extensively in process claims.

227. The supporting acts of the process step can either be recited in the claim or in the specification.

228. Even after determining that a process claim is couched in language which meets all of the statutory requirements of paragraph six, the statute may still not apply. If the supporting acts which further define the process step are not sufficiently described in the specification, not only will paragraph six of § 112 be inapplicable, the claim will likely be held invalid as being vague and indefinite. Alternately, if the supporting acts are sufficiently described in the claim itself, § 112 will probably not apply.

229. Likewise, most functional apparatus claims can alternately be expressed in means-plus-function language.

avoiding the express mandate of section 112(6).<sup>230</sup>

Consequently, if the foregoing proposition is correct, the result would signify that virtually *all* process claims are theoretically covered under paragraph six. Although the rationale behind this theory seems sound, it is hard to believe that the Federal Circuit would restrict the scope of this commonly used form of claiming to a point where it would no longer make sense to utilize it under any circumstances.<sup>231</sup> This is likely not a result the original drafters of the Patent Act envisioned or intended.

## CONCLUSION

Now we must await the ultimate decision from the Federal Circuit regarding the fate of process claims. Will the narrowing effect of paragraph six apply to process claims? If the answer is in the affirmative, the result could be thousands of frustrated patent owners who unfortunately claimed their invention in terms of a process or method, and now must face the reality of owning a patent with limited commercial value. An affirmative answer might also lead practitioners to avoid using process and method claims unless they have absolutely no other reasonable choices available to them.<sup>232</sup> Neither of these outcomes are particularly satisfying. On the other hand, if the Federal Circuit concludes that process claims are not covered under paragraph six, how will the court explain the apparent inconsistency in treatment between functional apparatus and process claims in light of a statute which is seemingly very clear on its face?<sup>233</sup>

Hence, it is suggested that the Federal Circuit may attempt to ride the “middle of the road,” finding that only purely functional process steps will be subject to being “cut back” by paragraph six. The definition to be given the phrase “purely functional” will no doubt cause the Federal Circuit great distress. Will the definition cover only those process claims which are “result-oriented?” Or, alternately, will it refer to indefinite process steps which fail to be adequately defined by a specific, unambiguous function? Or perhaps it is only those claim

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230. *Laitram Corp. v. Rexnord, Inc.*, 939 F.2d 1533, 1538 (Fed. Cir. 1991).

231. As virtually all process claims are, by definition, functional in nature, there would seem to be no way around the effects of paragraph six. This may not be an entirely satisfactory result. At least with the functional apparatus claim, the practitioner has a true choice between using structural or functional language and either invoking or avoiding the effects of § 112. It appears that the practitioner may not enjoy this same luxury when drafting process claims.

232. This would be an unfortunate result as the step-plus-function clause can serve as a convenient way of drafting a claim as broadly as prior art will permit. More importantly, the step-plus-function clause permits the practitioner to draft general expressions and phrases to cover claim elements when generic, structural terminology is unavailable. However, if generic terminology is available, it should be used in lieu of functional claim language to avoid the potential negative ramifications of paragraph six.

233. It is highly unlikely that the Federal Circuit will modify how means-plus-function claims are handled under paragraph six. To do so would be to call into question over four decades of judicial decisions interpreting functional apparatus claims.

elements which appear to broadly cover the ultimate result of a process step, in lieu of setting forth well-defined intermediary steps, which will feel the effect of paragraph six. Each one of these interpretations can legitimately be gleaned from the handful of federal cases which have dealt with this yet undecided issue. Nonetheless, a literal reading of the precise language of § 112(6) does not give a clear indication as to the accuracy of any of the statutory limitations mentioned above.

Thus, the Federal Circuit is faced with a very difficult decision with respect to the future of functional process claims. Regardless of the final outcome, one thing is sure. Virtually every patent attorney will have to re-evaluate their technique for drafting process or method claims (or forego them entirely) to ensure maximum patent protection for their clients.



# **ECONOMICS AND THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT: THE INFLUENCE OF FUNDING FORMULAS ON THE IDENTIFICATION AND PLACEMENT OF DISABLED STUDENTS**

**THERESA M. WILLARD\***

## **INTRODUCTION**

The Individuals with Disabilities Education Act (IDEA),<sup>1</sup> formerly the Education for all Handicapped Children Act, was enacted in 1975 in response to the increased acknowledgment that disabled children were being unfairly denied the educational opportunities enjoyed by their nondisabled peers.<sup>2</sup> Congress sought to remedy the inequality by providing supplemental federal funds to states which fulfill the requirements of IDEA, foremost among which is the provision to each disabled individual of a free appropriate public<sup>3</sup> education, in the least restrictive environment.<sup>4</sup>

IDEA provides little guidance, however, as to what constitutes an "appropriate" education.<sup>5</sup> Likewise, little definitive guidance is provided regarding how restrictive is too restrictive. Indeed, both of these requirements defy definition, as they must be determined on a case by case basis, depending on the needs of the individual.<sup>6</sup> There is a growing concern, however, that such determinations are being unduly influenced by economic concerns.<sup>7</sup> This Note will examine how special education is funded, focusing in particular on how various funding mechanisms may improperly affect the classification of disabled

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1. 20 U.S.C. §§ 1400-1485 (1994) [hereinafter IDEA].

2. *See* H.R. REP. NO. 94-332, at 2 (1975).

3. "The word 'public' is a term of art which refers to 'public expense,' whether at public or private schools." *Cefalu v. East Baton Rouge Parish Sch. Bd.*, 1997 WL 2523, 2 (5th Cir. 1997) (quoting *Dreher v. Amphitheater Unified Sch. Dist.*, 22 F.3d 228, 233 n.10 (9th Cir. 1994)).

4. 20 U.S.C. § 1412 (1994).

5. Mark C. Weber, *The Transformation of The Education of the Handicapped Act: A Study in the Interpretation of Radical Statutes*, 24 U.C. DAVIS L. REV. 349, 366 (Winter 1990) ("[Early articles discussing 'appropriateness'] noted . . . that the content of 'appropriateness' was so vague that it appeared Congress had left the term completely open to future administrative and judicial interpretation."). *See also* *Board of Educ. v. Rowley*, 458 U.S. 176, 206 (1982) (Court notes that "Congress was rather sketchy in establishing substantive requirements . . .").

6. 20 U.S.C. §§ 1400(c), 1401(a)(16) (1994).

7. *See, e.g.*, Fran O'Reilly, Center for Special Educ. Finance, *State Special Education Funding Formulas and the Use of Separate Placements for Students with Disabilities: Exploring Linkages*, (Policy Paper No. 7, 1995); Thomas B. Parrish, Center for Special Educ. Finance, *Fiscal Issues Related to the Inclusion of Students with Disabilities*, (Brief No. 7, 1995); U.S. Dep't of Educ., 17th Ann. Rep. to Congress on the Implementation of the Individuals with Disabilities Education Act (1995).

children and the educational programs implemented on their behalf. Part I will provide a brief overview of IDEA, its history, purpose, and requirements; Part II will discuss how IDEA's requirement of a free appropriate public education is balanced with that of the least restrictive environment; Part III will examine the issue of cost in providing special education and related services; Part IV will explore the various special education funding formulas used by the federal and state governments; Part V will examine the influence of funding formulas on the placement of special needs children; and Part VI will review several states' efforts at funding reform, then propose legislative reform which would lessen inappropriate fiscal influences on special education placement decisions.

### I. AN OVERVIEW OF IDEA

"The Congress finds that . . . there are more than eight million children with disabilities in the United States today [and that] more than half of the children with disabilities in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity . . . ."<sup>8</sup> Thus begins the IDEA. These findings reflect the fact that prior to the implementation of IDEA in 1975, disabled children were often excluded from public education, their academic needs largely unfulfilled, ignored, and, in some instances, actively frustrated.<sup>9</sup> In 1966, hearings before a subcommittee of the House of Representatives Education and Labor Committee revealed that only about one third of the nation's disabled children were receiving appropriate special education services. The other two thirds were either totally excluded from public education or "sitting idly in regular classrooms awaiting the time when they were old enough to drop out."<sup>10</sup>

In the early 1970's, however, the civil rights movement, which had already reformed the education of minority group students, began to influence the education of the handicapped as well.<sup>11</sup> Advocates of disabled children were arguing that the right to free public education which was afforded to non-handicapped children belonged to handicapped children, as well.<sup>12</sup>

In two federal court decisions, *Pennsylvania Association for Retarded Children v. Pennsylvania*<sup>13</sup> and *Mills v. Board of Education*,<sup>14</sup> the courts held that equal protection prevents the exclusion of handicapped children from public education. In states across the country, legislation regarding disabled children's rights to public education was being considered.<sup>15</sup> The social concerns

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8. 20 U.S.C. § 1400(b) (1), (3) (1994).

9. Weber, *supra* note 5, at 355-56.

10. U.S. Dep't of Educ., 17th Ann. Rep., *supra* note 7.

11. Weber, *supra* note 5, at 356.

12. *Id.*

13. 334 F. Supp. 1257 (E.D. Pa. 1971), *aff'd*, 343 F. Supp. 279 (E.D. PA. 1972).

14. 348 F. Supp. 866 (D.D. Cir. 1972).

15. Weber, *supra* note 5, at 357 (describing early efforts to provide education to the disabled).

underlying these decisions and legislative reforms became the impetus for IDEA.

The purpose of IDEA is to "assure that all children with disabilities have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs."<sup>16</sup> Such education is to be received by disabled children "to the maximum extent appropriate . . . with children who are not disabled," in what is commonly referred to as the "least restrictive environment."<sup>17</sup> Included in IDEA are eligibility requirements and application procedures for states seeking federal special education funds.<sup>18</sup> The eligibility requirements are stated in general terms, primarily insisting that the states develop and implement various detailed policies and procedures which will ensure that disabled individuals will indeed have an opportunity to receive a free appropriate public education.<sup>19</sup> The specifics of those policies and procedures, as well as how they are to be implemented, are left largely to the states.<sup>20</sup> The Act provides that States which fulfill the requirements receive federal funds to supplement their own special education budgets, thus encouraging compliance with federal special education guidelines.<sup>21</sup>

IDEA also provides administrative procedures designed to protect the rights of the disabled child and his parents or guardians.<sup>22</sup> These include an opportunity for parents to be involved in the educational decisions affecting their child and the right to an impartial due process hearing on any complaints the parents may have regarding the identification, evaluation, and placement of their child.<sup>23</sup>

IDEA is an individualized statute: decisions concerning how and where a disabled child should be educated are based on the individual child's "unique needs."<sup>24</sup> Because all children are different, with different strengths and weaknesses and thus different needs, it is impossible to formulate specific, universal guidelines for their education, and indeed, IDEA does not purport to do so.<sup>25</sup> It does, however, require in all instances that a disabled child have the opportunity to receive a "free appropriate public education" (FAPE) in the "least restrictive environment" (LRE).<sup>26</sup>

The primary vehicle for ensuring such an education is the student's

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16. 20 U.S.C. § 1400(c) (1994).

17. *Id.* § 1412(5)(b).

18. *Id.* §§ 1400-1485.

19. *Id.* § 1412.

20. *See supra* note 5 and accompanying text.

21. 20 U.S.C. §§ 1411-1414 (1994).

22. *Id.* § 1415.

23. *Id.*

24. *Id.* § 1400(c).

25. Laura F. Rothstein, *Disabilities and the Law* (1992), cited in Caren Jenkins, Note, *Administrative Exhaustion or Private Rights of Action: Priorities in Educating Students with Disabilities*, 25 GOLDEN GATE U. L. REV. 177, 184 (Spring 1995).

26. 20 U.S.C. § 1412 (1994).

Individualized Education Program, or IEP.<sup>27</sup> The IEP is a written statement which serves as a road map for the disabled child's education.<sup>28</sup> It includes a description of the child's current performance, short term and annual goals, special services to be provided to the child and the extent to which the child will be educated in a regular classroom, the anticipated duration of those services, and a schedule for evaluating the effectiveness of the IEP.<sup>29</sup> The IEP is created during a case conference attended by the child's parents or guardians, the child, when appropriate, his teacher, and a school representative authorized to offer and ensure the provision of necessary special services. The conference can also include any other interested parties, such as additional school personnel, therapists, psychologists, and others working with the disabled child.<sup>30</sup> All members of the IEP team are encouraged to provide input and suggestions regarding the child's educational needs and placement. A member of the IEP team may request a new case conference at any time, with the IDEA requiring that it reconvene a minimum of once a year to evaluate and make necessary revisions to the IEP.<sup>31</sup> In addition, parents who are dissatisfied with the identification and/or placement of their child may present a complaint which will be considered at an impartial due process hearing.<sup>32</sup>

## II. A BALANCING ACT

The goal of the case conference team is to create an IEP which will provide the child with a free appropriate public education (FAPE) in the least restrictive environment (LRE).<sup>33</sup> Ironically, even these two requirements (FAPE and LRE) do not always peacefully coexist.<sup>34</sup> Because IDEA provides little guidance concerning the meaning of these requirements, it has been left to courts to interpret them. The resulting decisions have distinguished between the two requirements.<sup>35</sup> Early decisions concentrated on FAPE, holding that it required only that states make available to each disabled child an education, at public

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27. *Id.* §§ 1401(a)(20). The court in *Oberti v. Board of Education* called the IEP the "centerpiece" of IDEA. 995 F.2d 1204, 1213 n.16 (3d Cir. 1993).

28. 20 U.S.C. § 1401(a)(20) (1994).

29. *Id.*

30. *Id.*

31. *Id.* § 1414(a)(5).

32. *Id.* § 1415(b).

33. See *supra* notes 26-27 and accompanying text.

34. *Oberti*, 955 F.2d at 1214 n.18 (citing Martha Minow, *Learning to Live with the Dilemma of Difference: Bilingual and Special Education*, 48 LAW & CONTEMP. PROBS. 157, 181 (Spring 1985)); see also Larry D. Bartlett, *Mainstreaming: On the Road to Clarification*, 76 ED. LAW REP. 17 (1992) ("By establishing these two requirements [FAPE and LRE] for the provision of special education to children with disabilities, Congress created an inherent tension in the implementation of the law.").

35. Weber, *supra* note 5.

expense, from which he might obtain some benefit.<sup>36</sup>

In *Board of Education v. Rowley*, Amy Rowley was a deaf elementary student whose parents challenged her IEP because it did not provide for Amy to have the services of a qualified sign language interpreter.<sup>37</sup> The District Court held that although Amy progressed easily from grade to grade with above average performance, her disability prevented her from hearing much of what transpired in the classroom, thus preventing her from achieving as much as she could if she could understand all that was being said.<sup>38</sup> The court then concluded that Amy was not receiving an appropriate education because she was not being given the opportunity to perform as well as if she had no disability.<sup>39</sup> The Supreme Court reversed, holding that the question of "appropriateness" was not whether the school was providing all it could to ensure the child's success, or whether the disabled child was benefitting from her education to the same degree as her nondisabled peers.<sup>40</sup> The Court asked only whether the disabled child was receiving some benefit from her education.<sup>41</sup> Because Amy was progressing from grade to grade with above average performance, the Court concluded that her IEP was satisfactory.<sup>42</sup>

The *Rowley* Court cautioned that its decision was tailored to the facts of the case.<sup>43</sup> Later lower court decisions used this cautionary language to approach the discussion from a different angle, turning away from questions of appropriateness to examine questions of LRE, which the *Rowley* Court did not address.<sup>44</sup> Under IDEA, states are responsible for assuring that "to the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled, and that . . . removal of children with disabilities from the regular educational environment occurs only when the nature or severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily."<sup>45</sup>

Courts focusing on this provision emphasized Congress' intention that disabled children should be educated in the least restrictive environment. Based on this requirement, courts began to equate LRE with "mainstreaming", or inclusion.<sup>46</sup> Two similar but distinct tests have been developed for determining if the requirement has been satisfied, resulting in a split among the circuits

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36. *Board of Educ. v. Rowley*, 458 U.S. 176 (1982).

37. *Id.*

38. *Id.* at 185.

39. *Id.* at 185-86.

40. *Id.* at 198.

41. *Id.* at 203.

42. *Id.* at 209-10.

43. *Id.* at 202.

44. See Weber, *supra* note 5, for a thorough discussion of the development of case history regarding the interpretation of IDEA.

45. 20 U.S.C. § 1412(5)(b) (1994).

46. *Oberti v. Board of Educ.*, 995 F.2d 1204, 1207 n.1 (3d Cir. 1993).

regarding which is the appropriate test.<sup>47</sup>

The first test, known as the Roncker Test, was developed by the Sixth Circuit in *Roncker v. Walter*.<sup>48</sup> Under this test, courts consider (1) the benefits the disabled child would receive in a segregated special education environment as compared to the benefits he would receive in a regular education classroom; (2) whether the disabled child would be a disruptive force in the regular education classroom; and (3) the cost of mainstreaming the disabled child.<sup>49</sup> In considering step one, if the services which make a segregated setting superior to an integrated one can be provided in the integrated setting, then the segregated setting is inappropriate.<sup>50</sup>

The Fifth Circuit, in *Daniel R.R. v. State Board of Education*,<sup>51</sup> declined to follow the Roncker Test, finding that it had little basis in the IDEA.<sup>52</sup> Instead, the court fashioned its own test, known as the Daniel R.R. Test.<sup>53</sup> This test considers four issues: (1) the steps which the school district has taken to accommodate the disabled child in a regular education classroom; (2) the academic benefits the disabled child will receive from a regular education placement; (3) the non-academic benefits the child will receive in the regular education classroom; and (4) the effect the disabled child's presence will have on the regular education class.<sup>54</sup>

In *Oberti v. Board of Education*, the Third Circuit engaged in a comprehensive discussion and application of the Daniel R.R. Test.<sup>55</sup> In that case, the parents of a child with Downs Syndrome sued the school board for the Clementon School District, challenging the district's decision to place the Oberti's son in a separate special education program outside the district.<sup>56</sup> Rafael Oberti was an eight year old boy with Downs Syndrome, a disability that

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47. The Ninth Circuit in *Board of Education v. Holland* combined features of both tests. See text Part V, *infra*. The court's decision resulted in a more complete analysis which encompassed the concerns of both disabled and nondisabled students as well as those of the school district involved. 14 F.3d 1398, 1400-01 (9th Cir. 1994).

48. 700 F.2d 1058, 1063 (6th Cir.), *cert. denied*, 464 U.S. 864 (1983). The Roncker test has been approved by the Fourth, Sixth, and Eighth Circuits. *See also* *Devries v. Fairfax County Sch. Bd.*, 882 F.2d 876, 879 (4th Cir. 1989); *A.W. v. Northwest R-1 Sch. Dist.*, 813 F.2d 158, 163 (8th Cir.), *cert. denied*, 484 U.S. 847 (1987).

49. *Roncker*, 700 F.2d at 1063. "Cost is no defense, however, if the school district has failed to use its funds to provide a proper continuum of alternative placements for handicapped children." *Id.*

50. *Id.*

51. 874 F.2d 1036, 1046 (5th Cir. 1989).

52. *Id.*

53. *Id.* This test is followed by the Third, Fifth, and Eleventh Circuits. *See* *Oberti v. Board of Educ.*, 995 F.2d 1204, 1215 (3rd Cir. 1993); *Greer v. Rome City Sch. Dist.*, 950 F.2d 688, 696 (11th Cir. 1991).

54. *Daniel R.R.*, 874 F.2d at 1046.

55. 995 F.2d 1204 (3rd Cir. 1993).

56. *Id.*

impaired his intellectual and communication abilities.<sup>57</sup> Before entering kindergarten, Rafael was evaluated by the school district's Child Study Team,<sup>58</sup> who recommended that Rafael be placed full time in a segregated special education class located in another school district.<sup>59</sup> Rafael's parents visited several of the special classes recommended by the school district but found them unacceptable.<sup>60</sup> Instead, the Obertis and the school district agreed that in the mornings Rafael would attend a regular developmental kindergarten class (for children not quite ready for kindergarten) at his neighborhood school, and in the afternoons he would attend a special education class in another school district.<sup>61</sup> The Clementon school district continued to be responsible for ensuring the appropriateness and effectiveness of Rafael's IEP because he lived in the Clementon district.<sup>62</sup>

Rafael progressed socially and academically in the developmental kindergarten class, but he experienced numerous behavioral difficulties.<sup>63</sup> These included repeated toileting accidents, temper tantrums, hiding during class, hitting and spitting on classmates, and, on several occasions, striking out at his teacher.<sup>64</sup> Although Rafael's teacher consulted with the school psychologist and other members of the Child Study Team to discuss ways of dealing with Rafael's behavioral problems, no significant steps were implemented and no special services were provided to aid Rafael and his teacher until late in the school year.<sup>65</sup> His IEP did not include a plan for addressing his behavioral difficulties, nor did it provide for special education consultation for his teacher or for communication between his teacher and the special education teacher.<sup>66</sup>

At the end of the school year, the school district again proposed placing Rafael in a segregated special education class for children classified as educable mentally retarded.<sup>67</sup> The district based its decision on Rafael's behavioral difficulties as well as their belief that Rafael could not benefit from education in a regular classroom.<sup>68</sup> Because Clementon School District did not offer a class such as they proposed, the separate placement would require Rafael to travel to another district.<sup>69</sup> His parents objected to the placement and requested that

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57. *Id.* at 1207.

58. New Jersey regulations defines the Child Study Team as "an interdisciplinary group of appropriately certified persons" responsible for determining Rafael's eligibility for special education and for developing, monitoring, and evaluating his *IEP*. *Id.* at 1208 n.2.

59. *Id.* at 1207.

60. *Id.*

61. *Id.* at 1207-08.

62. *Id.* at 1208 n.2.

63. *Id.* at 1208.

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

Rafael be placed in a regular classroom in his neighborhood school, but the school district refused.<sup>70</sup>

The parties eventually agreed that Rafael would attend a special education class for children classified as "multiply handicapped" in a public elementary school in another district.<sup>71</sup> The placement required Rafael to travel forty-five minutes by bus to reach school.<sup>72</sup> As part of the agreement, the school district "promised to explore mainstreaming possibilities . . . and to consider a future placement for Rafael in a regular classroom in his neighborhood school."<sup>73</sup>

Rafael progressed in the separate class: his toileting accidents and his disruptive behavior gradually abated.<sup>74</sup> Several months into the school year, however, Rafael's parents discovered that, contrary to the agreement, the school district was not considering plans to mainstream Rafael.<sup>75</sup> In addition, they learned that Rafael had no meaningful contact with nondisabled students at his school.<sup>76</sup> The Obertis then filed for a due process hearing, requesting once again that Rafael be placed in a regular education classroom in his neighborhood school.<sup>77</sup>

The Administrative Law Judge (ALJ) denied the Oberti's request and upheld the school district's decision that the segregated special education class in an outside district was the least restrictive environment for Rafael.<sup>78</sup> The ALJ based his decision primarily on the testimony of the school district's witnesses, who described Rafael's behavioral difficulties in the developmental kindergarten class the year before.<sup>79</sup> He discounted the testimony of the Oberti's expert witnesses, who contended that not only could Rafael be educated appropriately in a regular class with supplementary aids and services, but also that Rafael would benefit from being in a class with nondisabled children because he could learn important skills which he could not learn in the segregated class.<sup>80</sup>

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70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 1209.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* The school district's witnesses included the teacher of the developmental kindergarten class as well as other school district representatives and employees who had observed Rafael on one or more occasions. *Id.* at 1209 n.7.

80. *Id.* at 1210. The Obertis' witnesses included a professor of education at Temple University who was also an expert in the education of disabled children. Her testimony was based on her observations of Rafael in the special education class, of his neighborhood school, a review of Rafael's educational records, and her expertise in the area. Another witness for the Obertis was a teacher who had successfully integrated a Downs Syndrome student into his regular education class. The ALJ rejected the testimony of both witnesses because they did not have day-to-day experience with Rafael. However, the record does not indicate that the school district's witnesses,

Rafael's parents also testified that, based on their experience with and understanding of their son, they believed that a regular classroom with supplementary aids and services was the best placement for Rafael.<sup>81</sup> Mrs. Oberti testified that she believed that the segregated placement was having a negative emotional impact on Rafael, who would cry regularly before getting on the bus that would take him to his class forty five minutes away.<sup>82</sup> One of the Oberti's neighbors testified that her son and other nondisabled neighborhood children played with Rafael, and that it was her belief that they all learned from each other by working and playing together.<sup>83</sup>

Despite the testimony of the Obertis and their neighbor, the ALJ was convinced by the school district's witnesses that Rafael's behavioral difficulties in kindergarten precluded an inclusive placement.<sup>84</sup>

Pursuant to IDEA, the Obertis sought review of the ALJ's decision in the United States District Court. During trial, the Obertis presented additional expert witnesses who testified that Rafael should be placed in a regular classroom with supplementary aids and services.<sup>85</sup> Although the school district continued to argue for a segregated placement for Rafael, the district court held that the school district had violated IDEA's requirement that disabled students be educated in the least restrictive environment, with the help of supplementary aids and services.<sup>86</sup> The court found that the school district had made only negligible efforts to include Rafael in a regular class, failing to provide him with any supplementary aids and services while he was in the developmental kindergarten class; then making no efforts to reintroduce him into the mainstream after he began attending the segregated class.<sup>87</sup> The court also found that there was reason to believe that the disciplinary problems which Rafael experienced as a kindergartner would not resurface with proper aids and services and in light of

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with the exception of the kindergarten teacher, had such day-to-day contact, either. *Id.* at 1210 n.9.

81. *Id.* at 1210 n.10.

82. *Id.*

83. *Id.*

84. *Id.*

85. By the time the dispute reached the district court, two years had passed since Rafael's attendance in the developmental kindergarten class. Pursuant to IDEA, the court reviewed the record of the administrative hearing as well as new evidence presented. Testifying for the Obertis, in addition to those who had testified at the due process hearing, was a professor of special education from the University of Wisconsin who for over twenty years had acted as a consultant to hundreds of school districts throughout the country regarding the education of disabled children. Also testifying was an expert in communication with children with developmental disabilities who stated that Rafael's speech and language therapy would be most effective if provided in a regular classroom. *Id.* at 1210-11.

86. *Id.* at 1212. The court disagreed with the findings of the ALJ because "they were largely and improperly based upon Rafael's behavior problems in the developmental kindergarten as well as upon his intellectual limitations, without proper consideration of the inadequate level of supplementary aids and services provided by the School District." *Id.*

87. *Id.*

his progress in behavioral skills in the interim.<sup>88</sup>

Applying the Daniel R.R. Test to the district court's findings, the Court of Appeals for the Third Circuit affirmed the district court's order that the school district develop a more inclusive program for Rafael for the following school year.<sup>89</sup> The court concluded that the school district had not taken sufficient steps to accommodate Rafael in the regular classroom, that the benefits to Rafael of an integrated placement would be significant, and that there was reason to believe that any lingering disruptive tendencies would be alleviated with the help of proper supplementary services.<sup>90</sup> The court added that even if a disabled child cannot be satisfactorily educated by full-time inclusion in a regular class, the school district still has an obligation to include the disabled child in school activities with nondisabled children whenever possible.<sup>91</sup> The court found an affirmative duty on the part of public schools to mainstream disabled students to the greatest possible degree, and to bring special education and related services to them in their regular education classrooms.<sup>92</sup>

Although the courts have divided the questions of FAPE and LRE, the statute in fact requires both.<sup>93</sup> As case history demonstrates, however, there is an inherent tension between appropriateness and inclusion.<sup>94</sup> By their very definition, specialized services are those offered to the disabled child to address needs which cannot be served by the regular education program.<sup>95</sup> These services can range from simple modifications in classwork, to intensive individualized instruction in an area of particular difficulty, to training in basic daily living skills, and although some can indeed be brought to the regular education classroom, clearly some of these services have to be provided in a more exclusive environment.<sup>96</sup> While inclusion in the regular education classroom provides significant social and academic benefits to the disabled child, an inappropriate insistence on including all disabled children in the regular classroom all of the time would deprive some children of needed help.<sup>97</sup> It thus becomes a balancing

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88. *Id.*

89. *Id.* at 1223-24.

90. *Id.* at 1221-22.

91. *Id.* at 1218.

92. *Id.* at 1224 n.29.

93. 20 U.S.C. § 1412 (1994).

94. *Oberti v. Board of Educ.*, 995 F.2d 1204, 1214 (3d Cir. 1993). The court quotes from Minow, *supra* note 34, who wrote that IDEA "embodies an express tension between its two substantive commitments to the 'appropriate education' and to the 'least restrictive alternative.' This tension implicates the choice between specialized services and some degree of separate treatment on the one side and minimized labeling and minimized segregation on the other." *Id.* at 1214 n.18.

95. See *supra* note 94.

96. 20 U.S.C. § 1401(16), (17), (18), (19) (1994); see also *supra* note 94.

97. "The provision of appropriate educational programming may not always be available in the least restrictive setting, and the least restrictive setting may not always be the appropriate place for providing an education program." Bartlett, *supra* note 34, at 17.

act: to what extent can or should the disabled individual be educated in a regular education classroom with nondisabled peers and still receive the services he needs for an appropriate education.<sup>98</sup>

This is not a question easily resolved, nor is there only one answer. IDEA and its regulations offer guidance in the requirement that a "continuum of placements" be provided for disabled students.<sup>99</sup> Implemented properly, such a provision would allow educators and parents to move along the continuum until the best balance is found. Still, a new balance must be found in each individual case.<sup>100</sup> As the considerations on each end of the scale continue to be weighed today, it is imperative that the focus remain on the rights of disabled children to equality of educational opportunity, and that the balance reflect a genuine effort to protect those rights.

### III. THE COST FACTOR

As courts and commentators have recognized, the balance is further complicated by the issue of cost.<sup>101</sup> Within the disabled student population, the cost of individuals' special education programs varies, but it is estimated that the average cost of the education of a disabled child is roughly two and a half times greater than that of a nondisabled child.<sup>102</sup> In addition, the number of students receiving special services under IDEA continues to increase. Since the enactment of IDEA in 1975 as the Education for all Handicapped Children Act, the number of disabled school children receiving special education and related services has increased by over forty percent.<sup>103</sup> During the 1993-94 school year, about ten percent of the school age population, or over five million children, received special education services.<sup>104</sup>

The reality of economic concerns was recognized early in the debate regarding the education of disabled students. In *Mills v. Board of Education*,<sup>105</sup> one of the cases which spurred the enactment of IDEA, the court stated that "[i]f sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system then the available funds must be expended equitably in such a manner that no child is excluded from a publicly funded

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98. See David M. Engel, *Law, Culture, and Children with Disabilities: Educational Rights and the Construction of Difference*, 1991 DUKE L.J. 166, 187 (1991) (Parents advocating a more integrated placement for their disabled child face the difficult task of stressing the child's "unique needs" on the one hand and his similarities to nondisabled children on the other.).

99. 34 C.F.R. § 300.551(a) (1996).

100. See *supra* notes 24-25 and accompanying text.

101. See generally Leslie A. Collins & Perry A. Zirkel, *To What Extent, If Any, May Cost be a Factor in Special Education Cases?*, 71 ED. L. REP. 11 (1992).

102. *Id.*

103. O'Reilly, *supra* note 7, at 1.

104. *Id.*

105. 348 F. Supp. 866 (D.D. Cir. 1972).

education consistent with his needs and ability to benefit therefrom.”<sup>106</sup>

Subsequent decisions have similarly acknowledged the reality of financial influences on the development of special education programs.<sup>107</sup> The results of such economic considerations have varied. In one case, the court weighed the cost of a residential placement for a child with Down’s Syndrome against the appropriateness of such placement.<sup>108</sup> The court determined that while cost remained a viable consideration, the expense of the costly placement was outweighed in this instance by its appropriateness, and the school was thus required to provide the residential placement.<sup>109</sup>

In another case, the court held that the cost of necessary nursing services for a severely handicapped child, while appropriate given unlimited resources, would place an undue financial burden on the school, and the school was thus not required to provide such services.<sup>110</sup> However, the court emphasized that its decision was not to be construed as relieving schools from providing any high cost services: “[R]elated services’ [are not] only those services which can be provided at low cost to the district . . . . To the contrary, the states reap the benefit of federal monies [and may be required to provide] special services or [to hire] additional personnel at considerable expense.”<sup>111</sup>

The preceding cases are representative of the cases in which cost considerations are an issue in developing a special education program.<sup>112</sup> In some instances, the courts have found that the expense of providing a particular placement or service is prohibitive, despite its otherwise appropriateness for the child. In other cases, the child’s need for a particular placement or service, and its consequent appropriateness, was so great that it outweighed the high price tag. Most circuits agree, however, that realistically the cost of a proposed special education placement must be considered in determining whether the program should be implemented.<sup>113</sup>

It is, once again, a balancing act which must be achieved in each case, for each disabled child, individually. The expense of providing special education and related services, while encompassing a wide range,<sup>114</sup> can be extensive,<sup>115</sup> and although financial considerations alone cannot determine a child’s special

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106. *Id.* at 876.

107. See Collins & Zirkel, *supra* note 101, for a circuit by circuit discussion of how cost is considered in special education cases.

108. *Doe v. Anrig*, 692 F.2d 800 (1st Cir. 1982).

109. *Id.*

110. *Bevin H. v. Wright*, 666 F. Supp. 71 (W.D. Pa. 1987); see also *Barnett v. Fairfax School Bd.*, 927 F.2d 146, 154 (4th Cir.), cert. denied, 502 U.S. 859 (1991) (“[A]ppropriate’ . . . does not mean the best possible education that the school could provide if given access to unlimited funds.”).

111. *Wright*, 666 F. Supp. at 75-76.

112. See *supra* note 107.

113. See *supra* note 107.

114. Collins & Zirkel, *supra* note 101, at 11.

115. Some placements can cost more than \$100,000 per year. *Id.*

education placement,<sup>116</sup> they must nonetheless be a factor in any realistic determination of what a school can and should provide.<sup>117</sup> As one court stated, "Congress intended the states to balance the competing interests of economic necessity on the one hand, and the special needs of a handicapped child on the other, when making education placement decisions."<sup>118</sup>

#### IV. PROVIDING FUNDING FOR SPECIAL EDUCATION

##### *A. Federal Funding*

IDEA is, among other things, a funding statute. It requires states to provide disabled children with special education and related services in return for Federal funding aid.<sup>119</sup> Recent data indicates, however, that the Federal government provides only nine percent of the funding for special education.<sup>120</sup> The maximum amount of funding which the Federal government can provide to a particular state is determined by calculating the number of children in the state who are receiving special education and related services, according to IDEA stipulations, and multiplying that number by forty percent of the average per-pupil expenditure in public elementary and secondary schools across the United States.<sup>121</sup>

##### *B. State and Local Funding*

The remaining portion of special education funding is left to states and local sources to provide.<sup>122</sup> Unlike the Federal funding formula, which is the same for each state across the nation, state funding mechanisms vary from state to state.<sup>123</sup> The most widely used formula for providing special education funds is based on pupil weights.<sup>124</sup> The "pupil weighting" formula allocates funds based on two or more categories of student-based funding for special education, expressed as a multiple of regular education aid.<sup>125</sup> In other words, the amount allocated for special education is based on a per pupil calculation, with special education

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116. *Barnett v. Fairfax School Bd.*, 927 F.2d 146, 154 (4th Cir.), *cert. denied*, 502 U.S. 859 (1991); *Collins & Zirkel*, *supra* note 101, at 24 (concluding that "it would be inadvisable for any district to base a placement decision solely upon cost").

117. "Cost is a proper factor to consider since excessive spending on one handicapped child deprives other handicapped children." *Roncker v. Walter*, 700 F.2d 1058, 1063 (6th Cir.), *cert. denied*, 464 U.S. 864 (1983).

118. *Barnett*, 927 F.2d at 154.

119. 20 U.S.C. §§ 1411, 1412 (1994).

120. *Collins & Zirkel*, *supra* note 101, at 11.

121. 20 U.S.C. § 1411(a) (1994).

122. U.S. Dep't of Educ., 17th Ann. Rep., *supra* note 7.

123. *Id.*

124. *Id.* This formula is used in Alabama, Alaska, Arizona, Arkansas, Florida, Georgia, Hawaii, Indiana, Iowa, Kentucky, New Hampshire, New Jersey, New Mexico, New York, Oklahoma, Oregon, South Carolina, Texas, and Utah.

125. *Id.*

students being divided into categories based on placement and/or disability.<sup>126</sup> Those categories are then weighted to determine by what amount the regular education per pupil allocation should be increased for students in each category of special education students. The per pupil allocation in each special education category is then that amount multiplied by the regular education per pupil allocation.

For example, a state using categories based on disability may determine that the education of learning disabled students requires twice the funding required for the education of nondisabled children. The same state may determine that the education of autistic children requires three times the funding required for the education of nondisabled children. Then, the funds allocated for each learning disabled student will be twice the amount allocated for a single regular education student. Likewise, the funds provided for each autistic child will be three times the amount expended on a single regular education child.<sup>127</sup>

Similarly, a state using categories based on placement<sup>128</sup> may determine that educating a disabled child in a separate class within the public school requires twice the funds necessary to educate a child in the regular education classroom. The state may also decide that educating a disabled child in a private school requires three times the funding necessary to educate a child in a regular education classroom. Then, as above, when allocating funds for special education, funds provided for each disabled child placed in a separate class will be twice the amount allocated for a student educated in a regular education classroom. Likewise, the funds provided for each disabled student placed in a private school will be three times the amount allocated for a student educated in a regular education classroom.<sup>129</sup>

Also commonly used among states is a resource-based formula.<sup>130</sup> These states base their funding on the allocation of specific education resources, generally either teachers or classroom units, needed for special education.<sup>131</sup>

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126. *Id.*

127. IDEA lists ten distinct types of disabilities: mental retardation, hearing impairments, speech or language impairments, visual impairments, serious emotional disturbance, orthopedic impairments, autism, traumatic brain injury, other health impairments, and specific learning disabilities. 20 U.S.C. § 1401(a)(1)(A)(i) (1994). States using pupil weights may assign the same weight to several disabilities.

128. A sampling of placements discussed by O'Reilly, *supra* note 7, at 8, includes regular class, resource room, separate class, public day school, private day school, public residential school, private residential school, and homebound hospital.

129. This explanation is simplified both to make the issue easier to understand and to highlight the connection between funding and placement and/or disability. Some systems are considerably more complex: New Jersey's funding formula, for example, includes 26 weights based on student disability and placement. O'Reilly, *supra* note 7.

130. States using this formula include California, Delaware, Illinois, Kansas, Mississippi, Missouri, Nevada, Ohio, Tennessee, Virginia, and Washington. U.S. Dep't of Educ., 17th Ann. Rep., *supra* note 7.

131. *Id.*

Classroom units are derived from prescribed staff/student ratios by disability or placement.<sup>132</sup>

A third formula is percentage reimbursement, with funding based on a percentage of either allowable or actual expenditures.<sup>133</sup> Under this formula, the proportion of funds received from the state is the same regardless of the educational environment in which the disabled student is placed.<sup>134</sup>

The final funding mechanism is simply a flat grant, based on either special education enrollment or total enrollment.<sup>135</sup>

## V. FUNDING FORMULA AS AN INAPPROPRIATE INFLUENCE

As discussed in Parts II and III, courts have recognized that the educational placements of students needing special education and related services requires a balance between appropriateness, the least restrictive environment, and cost considerations. However, although little data exists regarding the issue, there are growing concerns that placement decisions are being improperly influenced by the funding formulas by which special education funds are allocated.<sup>136</sup> Specifically, there is some concern that certain funding formulas provide schools with an incentive to place disabled children in more restrictive educational environments, creating a disincentive to place disabled children in the regular education environment "to the maximum extent appropriate."<sup>137</sup> This frustrates not only the LRE requirement of IDEA, but also the FAPE requirement, as special education programs are then designed to meet the needs of the school, not the needs of the disabled child.<sup>138</sup>

Evidence that these concerns are well-founded is demonstrated in *Board of Education v. Holland*.<sup>139</sup> Rachel Holland was a moderately mentally handicapped nine year old.<sup>140</sup> She had an I.Q. of 44 (100 is average), and had attended various special education preschool programs in the Sacramento City

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132. *Id.*

133. *Id.*

134. O'Reilly, *supra* note 7, at 14. States using this formula include Colorado, Connecticut, Idaho, Louisiana, Michigan, Minnesota, Nebraska, North Dakota, Rhode Island, South Dakota, Wisconsin, and Wyoming. U.S. Dep't of Educ., 17th Ann. Rep., *supra* note 7.

135. *Id.* This system is used by Maryland, Massachusetts, Montana, North Carolina, Vermont, and West Virginia.

136. See O'Reilly, *supra* note 7; see also Parrish, *supra* note 7.

137. "[I]t is becoming increasingly clear that special education fiscal policies sometimes affect program provision in unanticipated ways and may sometimes serve as a barrier to the implementation of more integrated and inclusive programming for students with disabilities." Parrish, *supra* note 7, at 2.

138. "Governmental statements of support for more inclusive placements are not likely to change local practice if the accompanying fiscal provisions actively discourage them." *Id.* at 2.

139. 14 F.3d 1398 (9th Cir. 1994).

140. *Id.* at 1400.

Unified School District.<sup>141</sup> When she was ready to enter kindergarten, Rachel's parents requested that she be placed in a regular education classroom full time.<sup>142</sup> The school district denied the request and suggested a placement whereby Rachel would be in a special education classroom for academic subjects and a regular education classroom for non-academic subjects, such as art, music, lunch, and recess.<sup>143</sup> Rachel's parents rejected this placement and instead enrolled Rachel in a regular education classroom in a private school.<sup>144</sup> She remained in regular classes in the private school for the several years during which her placement was disputed and finally resolved.<sup>145</sup>

Pursuant to IDEA,<sup>146</sup> Rachel's parents appealed the school district's placement decision to a state hearing officer.<sup>147</sup> The Hollands argued that Rachel most effectively improved both social and academic skills in a regular education classroom and would not benefit from a special education class.<sup>148</sup> The school district's position before the hearing officer was that Rachel's disability was too severe to allow her to benefit from a regular class.<sup>149</sup>

The hearing officer found that Rachel had indeed benefitted from the regular class, that she was not disruptive in the regular class, and that the cost was not so great that it weighed against placing Rachel in a regular class.<sup>150</sup> The school district was ordered to place Rachel in a regular education classroom full time with support services.<sup>151</sup>

The school district appealed to the district court.<sup>152</sup> The court established a four part inquiry, which was approved by the court of appeals, to determine the appropriateness of the school district's proposed placement.<sup>153</sup> First, the court must consider the educational benefits available to the child in a regular education classroom, supplemented with appropriate aids and services, as compared to the educational benefits available in a special education classroom; second, the court must consider the non-academic benefits of interaction with non-disabled children; third, the court must consider the effect of the disabled child's presence on the teacher and other classmates; and fourth, the court must consider the cost of mainstreaming the child.<sup>154</sup>

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141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. 20 U.S.C. § 1415(b)(2) (1994).

147. *Holland*, 14 F.3d at 1400.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* at 1400-01.

154. *Id.*

The court found for Rachel on each of the first three considerations.<sup>155</sup> It relied on information from Rachel's teacher and parents as well as other experts who testified that Rachel had made "significant strides" in a regular classroom at the private school.<sup>156</sup> In addition, witnesses of both parties testified that Rachel was well-behaved and followed directions, and Rachel's teacher stated that Rachel did not interfere with the teacher's ability to teach the other children.<sup>157</sup> She suggested that Rachel would require only a part time aide to assist her in a regular classroom in the future.<sup>158</sup>

Regarding the issue of cost, the school district argued that it would cost the district \$109,000 to educate Rachel in a regular classroom full time.<sup>159</sup> They based this estimate on the cost of providing a full time aide for Rachel plus \$80,000 for school-wide sensitivity training.<sup>160</sup>

The court found this cost to be significantly overstated.<sup>161</sup> First, Rachel would not require a full time aide, only a part time aide.<sup>162</sup> Based on the school district's figure, this would probably cost less than \$15,000.<sup>163</sup> In addition, the court noted that not only did the district school fail to establish that sensitivity training was necessary, it found that even if such training were necessary, there was evidence from the California Department of Education that the training could be obtained at no cost.<sup>164</sup>

The school district had one final argument, however: *the cost of placing Rachel in a regular education classroom full time was too great because the school district would lose up to \$190,764 in state special education funding if Rachel were not enrolled in a special education classroom for at least 51% of the day.*<sup>165</sup> Despite evidence that Rachel benefitted significantly both academically and non-academically from full time enrollment in a regular education classroom,<sup>166</sup> despite evidence that she was not a disruptive influence and did not

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155. *Id.* at 1401-02.

156. *Id.* at 1401. The Hollands' witnesses testified that Rachel learned by "modeling" her nondisabled classmates, suggesting that the regular classroom placement provided motivation for Rachel. *Id.* at 1401 n.4.

157. *Id.* at 1401.

158. *Id.*

159. *Id.* at 1402.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.* The school district indicated that a full time aide would cost less than \$30,000 (\$109,000 total cost minus \$80,000 for sensitivity training).

164. Beyond these considerations, the court found that the school district's calculations should have included a comparison to the cost of their proposed placement for Rachel, which was a separate special education class with a full time special education teacher and two full time aides. *Id.*

165. *Id.* at 1404.

166. *Id.* at 1401.

interfere with the education of her peers,<sup>167</sup> despite evidence that the cost of mainstreaming Rachel would be insignificant,<sup>168</sup> and despite the requirements and purposes of IDEA,<sup>169</sup> the school district argued that Rachel should be placed in the less beneficial, more restrictive educational environment of a special education classroom which happened to enable the school district to obtain more funding from the state.<sup>170</sup>

It cannot be doubted that the promise of greater funding for particular special education placements can provide a powerful incentive for schools to find those placements the most "appropriate" educational settings for disabled children.<sup>171</sup> The same can be argued for funding based on type of disability: where more severe disabilities garner more funding for the school district, schools have an incentive to classify students as having those disabilities. In turn, the severity of the disability identified can lead to the conclusion that the child needs more specialized services, and hence a more restrictive placement.<sup>172</sup>

A recent study sought to examine the relationship between states' funding formulas and their use of more restrictive placements for disabled children.<sup>173</sup> Although the results were inconclusive,<sup>174</sup> the study revealed that among the five highest users of separate placements, three used a funding formula based on placement or a combination of placement and disability.<sup>175</sup> In contrast, among the thirteen lowest users of separate placements, none used a funding formula based on placement, and only one used a formula based on disability.<sup>176</sup> On the other hand, eight of these thirteen states used a formula based on percentage reimbursement, which does not reward a school district for particular placements.<sup>177</sup>

## VI. THE NEED FOR REFORM

Although a state's funding formula is not the only indicator of the incidence of more restrictive special education placements by school districts within the state,<sup>178</sup> it is nonetheless a major influence on placement decisions.<sup>179</sup> In a 1994

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167. *Id.*

168. *Id.* at 1402.

169. 20 U.S.C. § 1412 (1994).

170. *Holland*, 14 F.3d at 1402, 1404.

171. See O'Reilly, *supra* note 7, at 22; Parrish, *supra* note 7, at 2.

172. Parrish, *supra* note 7, at 2 (states a similar thought in even broader terms: "One way to avoid restrictiveness in the placement of students is to avoid fiscal incentives for identifying students as special education in the first place.").

173. O'Reilly, *supra* note 7.

174. *Id.* at 14.

175. *Id.* at 15.

176. *Id.*

177. *Id.*

178. *Id.* at 22.

179. See generally O'Reilly, *supra* note 7; Parrish, *supra* note 7.

survey of State Educational Agency personnel in all fifty states, respondents acknowledged that the need to eliminate funding incentives that lead to restrictive placements was a primary driving force behind recent efforts to reform special education funding.<sup>180</sup> Several states have already begun the process. For example, Massachusetts, Montana, Pennsylvania, and Vermont have revised their state funding formulas in an attempt to break the link between funding and special education student count.<sup>181</sup> They now provide funds based on a form of census-based funding, whereby the amount of special education funding received by a school district is based on the district's total student enrollment, rather than on the number of students specifically identified for special education services.<sup>182</sup> This removes any financial incentive for labeling children as disabled or for placing them in restrictive special education programs. In Oregon, the state funding formula was recently revised to provide for a single pupil weight, with the per pupil special education allocation being twice that of the per pupil general education allocation.<sup>183</sup> While this does not remove the incentive for identifying children as disabled, it does remove financial incentives for providing restrictive placements for disabled students.<sup>184</sup>

Although these developments are encouraging, they are insufficient alone to ensure that the educational rights of disabled children are protected. It is proposed, therefore, that Congress amend the IDEA to strengthen such protection. This can be done in one of several ways. One alternative would be for Congress to restrict states' choices of special education funding formulas to those which do not encourage restrictive placements. Under such a scheme, any funding formula that is based on placement and/or disability would be prohibited. Grave concerns surround such a proposition, however. Most significantly, it promotes undue federal interference in an area (education) which has traditionally been considered a state concern.<sup>185</sup> This violates the principles of federalism on which our government is founded,<sup>186</sup> "one of the peculiar strengths [of which is] each State's freedom to 'serve as a laboratory; and try novel social and economic experiments.'"<sup>187</sup>

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180. U.S. Dep't of Educ., 17th Ann. Rep., *supra* note 7. The survey was conducted by the Center for Special Education Finance (CSEF), a research center funded by the Department of Education.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. "[I]t is well established that education is a traditional concern of the states." *United States v. Lopez*, 115 S. Ct. 1624, 1640 (1995) (Kennedy, J., concurring) (citing *Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974)); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).

186. *Id.*

187. *San Antonio Independent Sch. Dist. v. Rodriguez*, 411 U.S. 1, 50 (1973) (quoting *New State Ice Co. v. Liebmann*, 285 U.S. 262, 280 (1932) (Brandeis, J., dissenting)); *see also United States v. Lopez*, 115 S. Ct. 1624, 1641 (1995) (Kennedy, J., concurring) ("[T]he theory and utility of our federalism are revealed [when] the States may perform their role as laboratories for

This is particularly true when, as with special education funding formulas, the best alternative is not easily discerned.<sup>188</sup> In the 1994 survey of State Educational Agencies, the respondents as a group identified more than a dozen issues involved in developing a special education funding formula.<sup>189</sup> While the elimination of incentives for creating restrictive placements was a major concern, other concerns included flexibility, formula simplicity, fiscal accountability, and equity.<sup>190</sup> Allowing the states to act as laboratories for experimentation with various formulas affords the states the opportunity to balance these issues, prioritizing them according to local needs, and to develop and refine a workable formula which promotes those priorities. Evidence that this advantage of federalism is being realized lies in the growing number of states who have recently implemented, or are considering implementing, special education funding reform. Restricting the states' opportunity to experiment eliminates this advantage.

A better solution would be to eliminate from the IDEA the ambiguity regarding appropriateness and least restrictive environment. This could be accomplished by codifying the Ninth Circuit's test for placement discussed in *Board of Education v. Holland*.<sup>191</sup> This test combines features from both the Roncker Test and the Daniel R.R. Test to create a more comprehensive test which provides greater protection to disabled children consistent with the purpose and language of the IDEA.<sup>192</sup> The Holland Test also provides protection to teachers and nondisabled children by considering their need to educate and be educated in an environment free from undue disruption.<sup>193</sup> It also protects school districts by allowing them to consider the expense of alternative placements and the reality of limited funds.<sup>194</sup> It should be emphasized, however, that cost is the last consideration, and any revision of the IDEA must clearly state that the other considerations outlined in the Holland Test take precedence over fiscal concerns. If those considerations are resolved in favor of inclusion, then only in extreme circumstances, developed on a case by case basis, will cost be permitted to influence a disabled child's placement. The burden must be on the school district to show first, that the funds allocated to it for the education of disabled children were in fact expended on those children and their educational programs, and second, that extreme financial concerns exist which preclude an inclusive placement.

The advantage of codifying placement considerations to comply with the

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experimentation to devise various solutions where the best solution is far from clear.").

188. *Lopez*, 115 S. Ct. at 1640.

189. U.S. Dep't of Educ., 17th Ann. Rep., *supra* note 7.

190. *Id.*

191. 14 F.3d 1398, 1404 (9th Cir. 1994). *See supra* Part V.

192. *Holland*, 14 F.3d at 1404. Steps 1 & 2 require the consideration of both academic and non-academic benefits that inclusion will provide to the disabled student.

193. *Id.* Step 3 requires consideration of the effect the disabled child will have on the teacher and on nondisabled classmates.

194. *Id.* Step 4 allows consideration of the costs of inclusion.

Holland Test, in addition to those already stated regarding the protection of the rights of all interested parties, lies in the resulting clarity of IDEA. Schools and parents would no longer be forced to guess what is required or what the children's rights are, and the extra guidance would likely result in more appropriate, effective placement decisions being made from the beginning. Not only would this benefit the disabled child by providing equality of educational opportunity, but it would also often eliminate the need for costly litigation which can divert resources away from the needs of the students, take crucial years of a child's development to be resolved, and create ill will between parents and the educators with whom their children spend a great portion of their early lives.

In addition, including placement considerations in a federal statute would not create the federalism concerns outlined above. States would still be free to experiment with funding formulas and with alternative placement ideas, as long as their decisions satisfied the IDEA's appropriateness and least restrictive environment requirements, as clarified by the Holland Test.

### CONCLUSION

The ambiguity of the IDEA's substantive requirements, and the disagreement of the courts regarding how it is to be implemented, has created uncertainty regarding the educational rights of disabled children and the environment in which they should be educated. Further complicating matters is the reality of rising costs and limited funds, coupled with funding formulas which provide incentives to schools to place disabled children in more restrictive environments. While it would be inadvisable for the federal government to attempt to eliminate the use of incentive-laden funding formulas, the effect of such formulas could be counteracted by the inclusion in the IDEA of standards by which special education placement decisions must be guided. Standards consistent with the purpose of the IDEA were developed by the Ninth Circuit in *Board of Education v. Holland*.<sup>195</sup> The codification of the Holland Test would promote the purpose of IDEA and simplify its implementation. It would prevent financial incentives from contributing to the segregation of disabled children, while at the same time addressing the economic difficulties of providing the continuum of alternative placements and options envisioned in IDEA and necessary for the appropriate education of disabled children. In addition, the Holland Test would promote greater financial accountability, as the burden would be on school districts to regularly show that the state funds they receive are being spent on the disabled children and their special education programs for which the funds were requested and designated.

With revisions such as these, the special education programs developed for disabled children will truly be the product of genuine consideration of the children's interests and their right to equality of educational opportunity. Only then can IDEA's purpose be fulfilled—that each disabled child have an opportunity to receive a free appropriate public education in the least restrictive environment.

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195. 14 F.3d 1398, 1404 (9th Cir. 1994).



# STRIKING BACK AT “EXTORTIONATE” SECURITIES LITIGATION: *SILICON GRAPHICS* LEADS THE WAY TO A TRULY HEIGHTENED AND UNIFORM PLEADING STANDARD

MICHAEL A. DORELLI\*

An executive at a prominent west coast software company accepts the apprehensively awaited telephone call. His attorney, with a solemn tone, informs him of his options. Almost a month before, after a drop in the company’s stock price of nearly forty percent over a one-week period, a securities fraud class action was filed against the company. The complaint alleged that the company reported “artificially inflated” sales figures during a period in which key officers of the company sold “substantial” amounts of their stock holdings. The complaint stated little else, other than that the timing of the stock sales raises a “strong inference” that the company *fraudulently* overstated its sales figures with the intention of misleading investors and reaping an illegal profit for its officers.

The attorney advises the executive that despite the fact that the class has no evidence that anyone at the company acted “fraudulently,” and despite that the class would not likely be successful if the suit proceeded to trial, the cost of *defending* the suit through trial would far exceed the cost of simply settling the case now. The executive stares down at his desk with his hand over his eyes. His thoughts are consumed by images of the attorneys for the class; a room full of suits, champaign, toasting, and laughter. The size of the settlement would ensure that their share would greatly overcompensate them for the slight effort involved in watching the market for an unfortunate dive in a company’s stock price; the painstaking work that must have been involved in drafting the complaint, filed only days after the price drop. Images of the stockholders making up the class enter his mind. Was the lawsuit filed for their benefit? Or was it for the benefit of the men and women in that room; drinking in celebration and confident that it would always be “this easy.” He sighs as he raises his head and returns his attention to the telephone, instructing his attorney to take the only financially reasonable action. “Make the call,” he concedes. He lowers the telephone and returns his head to his hands.

## INTRODUCTION

Of the many provisions contained in the Private Securities Litigation Reform Act of 1995<sup>1</sup> that were intended to deter the filing of frivolous securities fraud lawsuits, one of the most controversial is the so-called “heightened pleading requirement,” which requires a plaintiff filing a securities fraud lawsuit under Rule 10b-5<sup>2</sup> to “state with particularity facts giving rise to a strong inference that

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1. Pub. L. No. 104-67, 109 Stat. 737 (1995) [hereinafter Reform Act].  
2. Rule 10b-5, 17 C.F.R. § 240.10b-5 (1995), makes it unlawful “[t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the

the defendant acted with the required state of mind.”<sup>3</sup> In his veto message on December 19, 1995, President Clinton named this provision as a principle area of concern.<sup>4</sup> Specifically, the President claimed that the new pleading requirement would “impose an unacceptable procedural hurdle to meritorious claims being heard in Federal courts. . . . [It erects a] barrier to bringing suit . . . so high that even the most aggrieved investors with the most painful losses may get tossed out of court before they have a chance to prove their case.”<sup>5</sup> Despite the President’s veto, the Reform Act became law on December 22, 1995.<sup>6</sup>

Section 21D(b)(2) was created in response to concerns regarding abusive or frivolous securities litigation initiated for the purpose of extracting a settlement from a defendant without regard to the actual merits of the lawsuit.<sup>7</sup> While settlements are generally considered voluntary resolutions by the parties to a lawsuit, and those parties are normally free to go to trial if a satisfactory settlement agreement cannot be reached, securities litigation is among a class of cases in which settlements are not always completely voluntary nor are they accurate with respect to the likely outcome of a trial.<sup>8</sup> “These settlements are not voluntary in that trial is not regarded by the parties as a practically available alternative for resolving the dispute, and they are not accurate in that the strength of the case on the merits has little or nothing to do with determining the amount of the settlement.”<sup>9</sup> Defendants to such lawsuits may find settlement preferable to going to trial for several reasons, including the possibility of extensive, costly discovery which is typical of most securities fraud suits and the resulting

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statements made, in the light of the circumstances under which they were made, not misleading, . . .” or to engage in other fraudulent practices concerning the sale or purchase of securities.

3. Reform Act, *supra* note 1, at 747 (adding § 21D(b)(2) to the Securities Exchange Act of 1934 [hereinafter Exchange Act]). This amended section of the Exchange Act is codified at 15 U.S.C. § 78u-4(b)(2) (Supp. II 1996).

4. Private Securities Litigation Reform Act of 1995, Veto Message From the President of the United States, H. DOC. NO. 150, 104th Cong., 1st Sess. (Dec. 19, 1995), *reprinted in* 141 CONG. REC. H15214-06, *available in* 1995 WL 752858 (daily ed. Dec. 20, 1995) [hereinafter Veto Message].

5. *Id.*

6. The House of Representatives overrode the veto by a vote of 319-100 on December 20, 1995. 141 CONG. REC. H15,223-24 (daily ed. Dec. 20, 1995). On December 22, 1995, the Senate overrode the veto by a vote of 68-30. 141 CONG. REC. S19,180 (daily ed. Dec. 22, 1995). The pleading provision to which the President objected remained unchanged.

7. H.R. CONF. REP. NO. 369, 104th Cong., 1st Sess., 141 CONG. REC. H13,702 (daily ed. Nov. 28, 1995) [hereinafter Conference Report].

8. See Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 499 (1991).

9. *Id.* The term “strike suit” has been used to describe such lawsuits, filed for their settlement value independent of their actual merits. See Tim Oliver Brandi, *The Strike Suit: A Common Problem of the Derivative Suit and the Shareholder Class Action*, 98 DICK. L. REV. 355 (1994); Note, *Extortionate Corporate Litigation: The Strike Suit*, 34 COLUM. L. REV. 1308 (1934).

disruption of the defendant's normal business operations.<sup>10</sup>

These apparent injustices to defendant corporations serve to line the pockets of predatory plaintiffs' attorneys who often file their lawsuits only days after some event such as a large drop in a company's stock price.<sup>11</sup> For example, on January 26, 1996, a lawsuit was filed against Touchstone Software Corporation for allegedly misleading investors.<sup>12</sup> Despite the weak case against Touchstone, the Huntington Beach, California company agreed to a settlement of \$1.3 million in cash and stock.<sup>13</sup> The company felt that the settlement was cheaper than fighting the case would have been.<sup>14</sup> Plaintiff's attorneys will probably earn between \$325,000 and \$390,000 for doing little more than filing a weak and possibly frivolous complaint.<sup>15</sup> Abusive practices such as this were considered by Congress in enacting the heightened pleading standard of section 21D(b)(2).<sup>16</sup> Congress felt that "[t]he private securities litigation system is too important to the integrity of American capital markets to allow this system to be undermined by those who seek to line their own pockets by bringing abusive and meritless suits."<sup>17</sup> Congress enacted section 21D(b)(2) both (1) to reduce abusive practices in the securities litigation system through *stricter* pleading requirements, and (2) to resolve the ambiguity created by differing judicial interpretations of Rule 9(b) through a *uniform* standard of pleading.<sup>18</sup>

Despite Congress' attempt to reduce the above described abusive litigation practices through the stricter, uniform pleading requirements of section 21D(b)(2), judicial interpretation of this provision since the passage of the Reform Act has not furthered the cause. In the year following the passage of the Reform Act, two courts reported significant decisions on what is meant by a "strong inference" of scienter: *Marksman Partners v. Chantal Pharmaceutical Corporation*<sup>19</sup> and *In re Silicon Graphics, Inc. Securities Litigation*.<sup>20</sup> *Marksman*

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10. *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 739-43 (1975); *see also* *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 189 (1994) (stating that defendants may find it necessary as a matter of business judgment to pay a settlement rather than face the expenses and risks of going to trial).

11. Mike France, *Bye, Fraud Suits. Hello, Fraud Suits: New federal legislation isn't stopping class actions*, BUS. WEEK, June 24, 1996, at 127.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* Contingency fee contracts are normally based on a scale that correlates the percentage fee with the amount of work required of the attorney. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 9.4.2, at 532 (1986). Percentages may range from 25 to 33% if settlement occurs before trial, 33 to 40% if the case reaches trial, and up to 50% if the case is "exceptionally difficult or if an appeal or other posttrial proceeding [is] necessary." *Id.* at n.44.

16. *See* Conference Report, *supra* note 7.

17. *Id.*

18. *Id.*

19. 927 F. Supp. 1297 (C.D. Cal. 1996) [hereinafter *Marksman*].

20. No. 96-0393, 1996 WL 664639 (N.D. Cal. Sept. 25, 1996) [hereinafter *Silicon Graphics*]

applied the Second Circuit's pre-Reform Act "motive and opportunity" test for determining the sufficiency of facts in establishing a strong inference of the defendant's state of mind. Under this test, a plaintiff must plead facts which show that the defendant had (1) a motive to commit securities fraud and (2) an opportunity to commit such fraud.<sup>21</sup> *Marksman* held that Congress intended to codify the Second Circuit's case law regarding the establishment of a strong inference of scienter rather than to strengthen the pleading requirement beyond that practiced by the courts prior to the Reform Act.<sup>22</sup> *Silicon Graphics I* interpreted section 21D(b)(2) as a *strengthening* of the Second Circuit's strong inference standard. The court in *Silicon Graphics I* held that to sufficiently plead scienter, a plaintiff "must allege specific facts that constitute circumstantial evidence of conscious behavior by defendants."<sup>23</sup>

If future courts follow the line of reasoning of the court in *Marksman*, section 21D(b)(2) will become nothing more than a codification of Second Circuit case law<sup>24</sup> and the abusive practices which the Reform Act sought to redress will continue to occur. It is concluded in this Note that the analysis followed by the court in *Marksman* is flawed. It is suggested that courts in the future should interpret section 21D(b)(2) as did the court in both *Silicon Graphics* decisions: as a strengthening of existing pleading requirements rather than a codification of the Second Circuit's motive and opportunity test for pleading scienter. Part I of this Note discusses Federal Rule of Civil Procedure 9(b), its purposes, and why securities fraud is particularly susceptible to abuse and frustration of those purposes. Part II then discusses the motive and opportunity test in greater detail and describes its inadequacies in light of the problems facing our capital markets. Part III discusses the legislative history of the Reform Act and section 21D(b)(2)

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]. The court in *Silicon Graphics I* granted the plaintiffs leave to amend their complaint. The court later dismissed the plaintiffs' amended complaint with prejudice. *In re Silicon Graphics, Inc. Sec. Litig.*, 970 F. Supp. 746, 768 (N.D. Cal. 1997) [hereinafter *Silicon Graphics II*].

21. Ross v. A.H. Robins Co., 607 F.2d 545 (2d Cir. 1993); *In re Time Warner Sec. Litig.*, 9 F.3d 259 (2d Cir. 1993); Shields v. Citytrust Bancorp, Inc., 25 F.3d 1124 (2d Cir. 1994). Second Circuit case law also establishes that in addition to meeting the motive and opportunity test, plaintiffs may sufficiently plead scienter by alleging facts which constitute "circumstantial evidence of either reckless or conscious behavior." *In re Time Warner*, 9 F.3d at 269.

22. *Marksman*, 927 F. Supp. at 1310-14. *Zeid v. Kimberley*, 930 F. Supp. 431 (N.D. Cal. 1996), was decided shortly after *Marksman*. *Zeid* also evaluated a complaint through application of the motive and opportunity test but, unlike *Marksman*, did not address the issue of whether section 21D(b)(2) was intended to be a strengthening of the Second Circuit's case law. The court simply concluded that satisfaction of the Second Circuit's standard would meet the strong inference requirement of the Reform Act.

23. *Silicon Graphics I*, 1996 WL 664639, at \*5. The court in *Silicon Graphics II* continued with this position, that to plead scienter adequately, a plaintiff must "do more than speculate as to defendant's motives or make conclusory allegations of scienter; plaintiffs must allege specific facts." *Silicon Graphics II*, 970 F. Supp. at 766.

24. See Paul H. Dawes, *Pleading Motions Under the Private Securities Litigation Reform Act of 1995*, 958 PLI/CORP. 37, 64-68 (1995).

and shows that Congress intended a *new* pleading requirement which is more strict than the Second Circuit's motive and opportunity test. Part IV analyzes the *Marksman* decision and explains why it is wrong. Finally, Part V analyzes *Silicon Graphics I* and shows that the decision follows a truly "heightened" pleading standard which is consistent with Congress' intent and which strikes an appropriate balance between the need to prevent and redress deceptive and manipulative practices and the maintenance of efficient and respectable capital markets. Part V further explains how *Silicon Graphics II* continues with this view and demonstrates the inadequacies of the *Marksman* approach.

### I. RULE 9(B): HIGHER STANDARDS FOR SECURITIES FRAUD LAWSUITS

A motion to dismiss a complaint based on the plaintiff's failure to plead facts sufficient to establish a strong inference of scienter is normally based on Rule 9(b) of the Federal Rules of Civil Procedure.<sup>25</sup> Rule 9(b) provides: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally."<sup>26</sup> Thus, Rule 9(b) raises the general pleading standard of Rule 8, which provides in pertinent part, that a party must plead only "a short plain statement of the claim showing that the pleader is entitled to relief . . .".<sup>27</sup> It has been argued that the first sentence of Rule 9(b) heightens the pleading standard beyond that of Rule 8 with respect to claims of fraud or mistake, but that the second sentence relaxes this requirement with respect to pleading of the defendant's state of mind.<sup>28</sup> The rationale behind relaxing the pleading requirement for the defendant's state of mind is that "it is unrealistic to expect a plaintiff, at the commencement of an action, to be able to present facts specifically demonstrating that a defendant acted with the requisite state of mind. Indeed, in most cases, it may be impossible at the pleading stage, before any discovery has been taken, to meet such a burden."<sup>29</sup> However, because the defendant's state of mind is of such integral importance to a claim of securities fraud, and due to the potential for abuse of securities litigation practices,<sup>30</sup> this part of Rule 9(b) should not be read as a complete reversion to

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25. See John W. Avery, *Securities Litigation Reform: The Long and Winding Road to the Private Securities Litigation Reform Act of 1995*, 51 BUS. L.W. 335, 345-46 (1996).

26. FED. R. CIV. P. 9(b).

27. FED. R. CIV. P. 8(a)(2).

28. See Laurence A. Steckman & Kenneth M. Moltner, *Pleading Scienter in Securities Fraud Cases Under Rule 9(b) -- Is the Pleading of Facts Sufficient to Give Rise to a "Strong Inference" of Fraudulent Intent Really Incompatible with the Federal Rules?*, 1995 ANN. SURV. AM. L. 99, 101-102.

29. Avery, *supra* note 25, at 346. Some courts have followed this line of reasoning in construing the second sentence of Rule 9(b). See, e.g., *Wool v. Tandem Computers*, 818 F.2d 531 (N.D. Tex. 1993).

30. See *supra* text accompanying notes 7-18.

the lax pleading standard articulated by Rule 8.<sup>31</sup>

The purposes of Rule 9(b) indicate that a high standard is necessary for pleading conditions of mind as well as the circumstances constituting the fraud, despite the greater difficulty of ascertaining sufficient facts at the pleading stage. "Courts have held that the purpose of Rule 9(b) is threefold: (1) to provide the defendant with adequate notice of a plaintiff's claims in order to mount a defense; (2) to protect the defendant's reputation from harm; and (3) to prevent the filing of strike suits."<sup>32</sup> Of these purposes, the prevention of the filing of strike suits for the purpose of extracting a settlement which is unproportionally large with respect to the merits of the case is probably the more important to most companies.<sup>33</sup> As discussed above, plaintiff attorneys often file lawsuits just days following a large drop in the price of a company's stock and are able to force large settlements from the company due to the company's desire to avoid the large costs of discovery which are normally associated with securities litigation.<sup>34</sup> A higher standard of pleading scienter in these cases therefore serves not only to deter future strike suits from being filed, but also clears the current suit from an already congested docket. Some argue that Rule 9(b) is an inappropriate, and likely ineffective, tool for deterring strike suits.<sup>35</sup> However, courts have disagreed and have had a tendency to be more demanding in their application of Rule 9(b) to securities fraud actions,<sup>36</sup> largely due to the unique susceptibility to the frustration of the purposes of the Rule which is inherent in securities fraud

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31. See *Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1128 (2d Cir. 1994) ("the relaxation of Rule 9(b)'s specificity requirement for scienter 'must not be mistaken for a license to base claims of fraud on speculation and conclusory allegations.'") (quoting *Wexner v. First Manhattan Co.*, 902 F.2d 169, 172 (2d Cir. 1990)).

32. Jared L. Kopel, *Procedural Reforms*, in *SECURITIES CLASS ACTIONS: ABUSES AND REMEDIES* 107, 108 n.6 (citing *Farlow v. Peat, Marwick, Mitchell & Co.*, 956 F.2d 982, 987 (10th Cir. 1992); *O'Brien v. National Property Analysts Partners*, 936 F.2d 674 (2d Cir. 1991); *In re Urarco Sec. Litig.*, 148 F.R.D. 561 (N.D. Tex. 1993)); see also *Billard v. Rockwell Int'l Corp.*, 683 F.2d 51 (2d Cir. 1982) ("This Court has previously construed Rule 9(b) strictly in order to minimize strike suits, to protect defendants, particularly accountants and other professionals, from harm to their reputation resulting from ungrounded actions, and to give defendants notice of the precise conduct in issue."); *DeVittorio v. Equidyne Extractive Indus., Inc.*, 822 F.2d 1242, 1247 (2d Cir. 1987) (reiterating the above goals of Rule 9(b)).

33. See Elliott J. Weiss, *The New Securities Fraud Pleading Requirement: Speed Bump or Road Block?*, 38 ARIZ. L. REV. 675, 678 (1996).

34. See Alexander, *supra* note 8.

35. See Note, *Pleading Securities Fraud Claims with Particularity Under Rule 9(b)*, 97 HARV. L. REV. 1432, 1439-43 (1984).

36. 10 LOUIS LOSS & JOEL SELIGMAN, *SECURITIES REGULATION* 4527 n.148 (1993) (citing 5 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE AND PROCEDURE* § 1297 at 613-14 (1990)); see also *In re Integrated Resources Real Estate Ltd. Partnerships Sec. Litig.*, 850 F. Supp. 1105, 1140 (S.D.N.Y. 1994) (explaining that Rule 9(b)'s pleading requirements should be applied more strictly in securities fraud cases).

litigation. The Court in *Blue Chip Stamps v. Manor Drug Stores*<sup>37</sup> encapsulated the concerns nicely:

There has been widespread recognition that litigation under Rule 10b-5 presents a danger of vexatiousness different in degree and in kind from that which accompanies litigation in general. . . . [T]o the extent that . . . [the liberal discovery provisions of the Federal Rules of Civil Procedure] permit a plaintiff with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the process will reveal relevant evidence, it is a social cost rather than a benefit.<sup>38</sup>

The most effective way to eliminate the social costs which were of concern to the Court in *Blue Chip Stamps* is to prevent a plaintiff preparing to undertake such a “fishing expedition” from ever reaching the discovery stage before presenting evidence sufficient to meet the particularity requirements of Rule 9(b), both with respect to the circumstances constituting the fraud and to the defendant’s state of mind. Admittedly, the defendant’s state of mind cannot possibly be pled with the same particularity as the circumstances of the alleged fraud.<sup>39</sup> Therefore, an appropriate balance must be struck between the need to protect the rights of plaintiffs with valid claims, and the need to prevent abuses of the securities litigation process and prevent the resulting damage to the nation’s capital markets.

Despite the general consensus among courts that Rule 9(b) should be read to require some type of particularity in pleading the state of mind of a defendant in a securities fraud action in order to effectuate this needed balance, the circuits have disagreed as to what exactly is required to meet the requirement.<sup>40</sup> The Second Circuit, and at least three other circuits, have required the plaintiff to allege facts which give rise to a strong inference of scienter.<sup>41</sup> These courts have used variants of the Second Circuit’s “motive and opportunity” test.<sup>42</sup> Other

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37. 421 U.S. 723 (1975).

38. *Id.* at 739-41.

39. See Avery, *supra* note 25, and accompanying text.

40. *Id.* at 346-47.

41. See *In re Time Warner Sec. Litig.*, 9 F.3d 259, 268-69 (2d Cir. 1993); *Tuchman v. DSC Comm. Corp.*, 14 F.3d 1061, 1068 (5th Cir. 1994) (“To plead scienter adequately, a plaintiff must set forth specific facts that support an inference of fraud.”); *Greenstone v. Cambex Corp.*, 975 F.2d 22, 25 (1st Cir. 1992) (“The courts have uniformly held inadequate a complaint’s general averment of the defendant’s ‘knowledge’ of material falsity, unless the complaint also sets forth specific facts that make it reasonable to believe that defendant knew that a statement was materially false or misleading.”); *DiLeo v. Ernst & Young*, 901 F.2d 624, 629 (7th Cir. 1990) (“Although Rule 9(b) does not require ‘particularity’ with respect to the defendants’ mental state, the complaint still must afford a basis for believing that plaintiffs could prove scienter.”).

42. The motive and opportunity test is described in detail in Part II of this Note. See *infra*, notes 45-66 and accompanying text.

circuits have required much less of plaintiffs in securities fraud suits, apparently placing less weight on the purposes of Rule 9(b) and having less concern for the protection of the efficiency and integrity of our nation's capital markets.<sup>43</sup>

In response to these concerns and to fulfill the above stated purposes of Rule 9(b), the Reform Act created section 21D(b)(2) in order to mandate the requirement that the plaintiff plead facts sufficient to give rise to a strong inference of scienter.<sup>44</sup> However, in order to understand that Congress intended to create a truly strengthened standard, higher than even that of the Second Circuit's strong inference and motive and opportunity standard, an analysis of the legislative history of the Reform Act and, in particular, of section 21D(b)(2) is necessary. In order to analyze how the new heightened pleading requirement differs from the pre-Reform Act Second Circuit standard, the Second Circuit's motive and opportunity standard for establishing a strong inference must be examined.

## II. MOTIVE AND OPPORTUNITY: THE SECOND CIRCUIT STANDARD

In the Second Circuit, a plaintiff in a securities fraud action must demonstrate:

some factual basis for conclusory allegations of intent. . . . These factual allegations must give rise to a 'strong inference' that the defendants possessed the requisite fraudulent intent. . . . A common method for establishing a strong inference of scienter is to allege facts showing a motive for committing fraud and a clear opportunity for doing so. . . . Where motive is not apparent, it is still possible to plead scienter by identifying circumstances indicating conscious behavior by the defendant, though the strength of the circumstantial allegations must be correspondingly greater. . . .<sup>45</sup>

The court in *Shields v. Citytrust Bancorp, Inc.*<sup>46</sup> restated this test by requiring plaintiffs to allege facts which give rise to a strong inference of scienter in order to "serve the purposes of Rule 9(b)."<sup>47</sup> A strong inference could be established

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43. See *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1547 (9th Cir. 1994) ("We conclude that plaintiffs may aver scienter generally, just as the rule states - that is, simply by saying that scienter existed."); *Phelps v. Wichita Eagle-Beacon*, 886 F.2d 1262, 1270 n.5 (10th Cir. 1989) (determining that a more relaxed approach to pleading scienter is more consistent with the plain language of Rule 9(b)); *Auslender v. Energy Mgmt. Corp.*, 832 F.2d 354, 356 (6th Cir. 1987) ("[T]he allegation of 'recklessness' on the part of [the defendant] is adequate to satisfy the scienter requirement of Rule 10b-5.").

44. See Reform Act, *supra* note 1, and accompanying text.

45. *Beck v. Manufacturers Hanover Trust Co.*, 820 F.2d 46, 50 (2d Cir. 1987) (this was the Second Circuit's first articulation of the motive and opportunity test for meeting the strong inference requirement for pleading scienter under Rule 9(b)) (citations omitted).

46. 25 F.3d 1124 (2d Cir. 1994).

47. *Id.* at 1128.

by (1) showing that the defendant had both the motive to commit fraud and the opportunity to commit it, or (2) by presenting strong circumstantial evidence of conscious misbehavior or recklessness.<sup>48</sup> "Motive would entail concrete benefits that *could be* realized by one or more of the false statements and wrongful nondisclosures alleged. Opportunity would entail the means and likely prospect of achieving concrete benefits by the means alleged."<sup>49</sup>

The rationale which supports this test for determining the sufficiency of a pleading in a securities fraud case is based on the basic, almost simplistic notion that a person who is in a position to benefit from a material misrepresentation is more likely to commit fraud than a person who will not benefit from such a misrepresentation.<sup>50</sup> This rationale implies that merely because a corporate executive could benefit by the commission of a fraud, subjecting him to all of the dangers and potential abuses of securities litigation is justified. Motive and opportunity, without more, is sufficient to justify potential damage to a corporation's reputation and a possible extortionate extraction of a settlement from the company. This rationale seems to ignore that it is considered more damaging in our society to convict an innocent party of an offense than it is to let a guilty party go unpunished.<sup>51</sup> Congress, in drafting section 21D(b)(2), and the entire Reform Act for that matter, was particularly concerned with the first risk: that of allowing a meritless suit to survive a motion to dismiss under Rule 9(b), thus permitting the possibility of an extortionate settlement.<sup>52</sup>

In response to the concern that too many meritless suits would be permitted to proceed and possibly force an unfair settlement, the Second Circuit has attempted to impose relatively strict requirements for establishing a strong inference of scienter through pleading of motive and opportunity to commit fraud.<sup>53</sup> For example, pleading that executives have motive to commit fraud

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48. *Id.* (The second method of sufficiently pleading scienter, through circumstantial evidence of conscious misbehavior or recklessness, rejected the "fraud by hindsight" method for establishing a strong inference of fraud. Optimistic projections which fail to materialize are insufficient to provide the required inference of scienter. The *Shields* court explained:

The pleading strongly suggests that the defendants should have been more alert and more skeptical, but nothing alleged indicates that management was promoting fraud. People in charge of an enterprise are not required to take a gloomy fearful or defeatist view of the future; subject to what current data indicates, they can be expected to be confident about their stewardship and the prospects of the business they manage.

*Id.* at 1129). *See also* VANYO & YODOWITZ, SECURITIES LITIGATION 138-39 (1995).

49. *Shields*, 25 F.3d at 1130 (emphasis added).

50. *See* Weiss, *supra* note 33, at 684.

51. *See* Lynn A. Stout, *Type I Error, Type II Error, and the Private Securities Litigation Reform Act*, 38 ARIZ. L. REV. 711 (1996) (discussing the balancing of the risk of allowing a meritless securities fraud lawsuit to proceed and the risk of keeping legitimate securities fraud claims out of court).

52. *See* Conference Report, *supra* notes 7, 16 and accompanying text.

53. *See* VANYO & YODOWITZ, *supra* note 48, at 139 (discussing *Shields*).

because they desire "to prolong the benefits of the positions they hold,"<sup>54</sup> has been held to be insufficient to support a strong inference of scienter.<sup>55</sup> If a plaintiff could successfully plead motive simply "by alleging the defendant's desire for continued employment, and opportunity by alleging the defendant's authority to speak for the company, the required showing of motive and opportunity would be no realistic check on aspersions of fraud, and mere misguided optimism would become actionable under the securities laws."<sup>56</sup> Thus, inferences of intent to commit fraud have not generally been found through reliance on "aspirations of financial success that are likely shared by the officers of all corporations."<sup>57</sup>

Through this "strict" application of the motive and opportunity test, the Second Circuit has found inadequate to establish a strong inference of scienter:

(1) allegations that defendants were motivated to defraud the public because an inflated stock price would increase their compensation;<sup>58</sup>

(2) alleged motives of maintaining good relations with suppliers, encouraging retailers to place orders, forestalling loan defaults, and protecting executives' positions;<sup>59</sup>

(3) alleged motive of maintaining a company's high bond rating.<sup>60</sup>

In sum, courts applying the motive and opportunity test have held that "generalized claims that corporate managers acted to retain the benefits of their positions or to enhance their compensation are not sufficiently particular to satisfy Rule 9(b)."<sup>61</sup>

However, not all courts applying the motive and opportunity test have held

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54. *Shields*, 25 F.3d at 1130; see also *Ferber v. Travelers Corp.*, 785 F. Supp. 1101, 1107 (D. Conn. 1991) ("Incentive compensation can hardly be the basis on which an allegation of fraud is predicated. On a practical level, were the opposite true, the executives of virtually every corporation in the United States could be subject to fraud allegations.").

55. *Id.*

56. *Id.*

57. *Grossman v. Texas Commerce Bancshares, Inc.*, No. 87CIV.6295, 1995 WL 552744, at \*11 (S.D.N.Y. Sept. 15, 1995) ("Thus, a court, '[i]n looking for a sufficient allegation of motive, . . . assume[s] that the defendant is acting in his or her informed economic self-interest,' . . . ; and allegations of motives that are generally held by similarly positioned executives and companies are insufficient to sustain a claim under the securities laws . . .") (quoting *Shields*, 25 F.3d at 1130).

58. *Grossman*, 1995 WL 552744, at \*11; *Acito v. Imcera Group, Inc.*, 47 F.3d 47 (2d Cir. 1995) ("Plaintiffs' allegation that defendants were motivated to defraud the public because of an inflated stock price would increase their compensation is without merit. . . . [T]he existence, without more, of executive compensation dependent upon stock value does not give rise to a strong inference of scienter.").

59. *In re Crystal Brands Sec. Litig.*, 862 F. Supp. 745, 749 (D. Conn. 1994) (the court believed that these allegations would pertain to virtually any company that manufactures and distributes goods).

60. *Stepak v. Aetna Life & Casualty Co.*, 1994 U.S. Dist. LEXIS 15559, at \*60 n.29 (D. Conn. 1994) (holding that such motives constitute general economic interest and are thus insufficient to support an inference of fraud under *Shields*).

61. *Weiss, supra* note 33, at 686.

consistently with this limitation. Professor Weiss cites three cases in particular which have held the protection of the executive's position and compensation to be a credible motive from which to infer scienter and fraud.<sup>62</sup> Weiss argues that cases such as these should not be interpreted with the new section 21D(b)(2), but "courts should not allow plaintiffs to litigate claims of open market fraud on the basis of vague and generalized allegations that could be made with respect to almost any public corporation."<sup>63</sup> He proposes that courts "should require plaintiffs to identify with reasonable specificity the economic benefits that defendants stood to realize by misrepresenting material facts."<sup>64</sup> However, while this sounds more reasonable than permitting generalized assertions of motive and opportunity, in practice it will not likely amount to a more stringent standard. Any plaintiffs' attorney with a little intelligence and creativity could come up with a set of particularized facts that might conceivably support an inference of scienter.<sup>65</sup>

From the analysis in this section, it should be clear that the motive and opportunity standard as it exists in the Second Circuit, while more stringent than other circuits, is not very difficult to overcome through creative lawyering, especially where the accusations are directed at the corporation's officers and directors.<sup>66</sup> If the abuses and dangers present in the securities litigation forum today are to be met and dealt with in accordance with Congress' intent in developing the Reform Act and section 21D(b)(2), a standard must be developed which is even more demanding than the motive and opportunity test of the Second Circuit. But first, it must be determined exactly what Congress intended when it enacted section 21D(b)(2).

### III. STATUTORY INTERPRETATION AND LEGISLATIVE HISTORY OF SECTION 21D(B)(2)

In response to the concerns about the existing problems and abuses in the private securities litigation system described above, Congress held nine hearings on securities litigation from 1993 to 1995.<sup>67</sup> "Congress [was] prompted by

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62. *Id.* at 685-86 (discussing *Morse v. Abbott Laboratories*, 756 F. Supp. 1108 (N.D. Ill 1991); *Kas v. Caterpillar, Inc.*, 815 F. Supp. 1158 (C.D. Ill 1992); and *Siebert v. Nives*, 871 F. Supp 110 (D. Conn. 1994)).

63. Weiss, *supra* note 33, at 686.

64. *Id.*

65. Stout, *supra* note 51, at 712 ("From that point it is determined at least as much by what the judge had for breakfast, as by any legal standard, whether the facts the plaintiff's attorney has presented will be deemed to support a strong inference of fraudulent scienter.").

66. See Elizabeth S. Stong, *Reform, What Reform?*, BUS. LAW TODAY, May/June 1998, at 33, 35 ("Recent surveys show that securities fraud claims based on allegations of accounting irregularities and insider selling rose sharply after the Reform Act.").

67. Avery, *supra* note 25, at 347; see also *Private Litigation Under the Federal Securities Laws: Hearings Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing, and Urban Affairs*, 103d Cong., 1st Sess. 1-3 (1993) (opening statement of Sen. Christopher J.

significant evidence of abuse in private securities lawsuits to enact reforms to protect investors and maintain confidence in our capital markets.<sup>68</sup> Congress heard evidence that the securities markets had been plagued by several types of abusive practices, including:

(1) the routine filing of lawsuits against issuers of securities and others whenever there is a significant change in an issuer's stock price, without regard to any underlying culpability of the issuer, and with only faint hope that the discovery process might lead eventually to some plausible cause of action; (2) the targeting of deep pocket defendants . . . without regard to their actual culpability; (3) the abuse of the discovery process to impose costs so burdensome that it is often economical for the victimized party to settle; and (4) the manipulation by class action lawyers of the clients whom they purportedly represent.<sup>69</sup>

As a part of its attempt to combat the problems of frivolous litigation explained in depth in the Conference Report, Congress enacted a heightened standard for pleading the defendant's state of mind in a securities fraud claim. This heightened pleading standard is included as section 21D(b)(2) of the Securities Exchange Act of 1934<sup>70</sup> and reads as follows:

In any private action arising under [the Securities Exchange Act of 1934] in which the plaintiff may recover money damages only on proof that the defendant acted with a particular state of mind, the complaint shall, with respect to each act or omission alleged to violate [the 1934 Act], *state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.*<sup>71</sup>

#### *A. Statutory Interpretation of Section 21D(b)(2)*

The language of section 21D(b)(2) is vague and does not alone provide a sound basis for establishing an actual requirement for pleading scienter. The portion of section 21D(b)(2) which is of particular importance for this analysis is the establishment of a *strong inference* of scienter. The question may be stated as follows: Did Congress intend 21D(b)(2) to be a codification of the Second Circuit's case law concerning the motive and opportunity test for establishing a strong inference of scienter, or did Congress intend a new, more stringent standard to develop?

The specific language of the statute might suggest that Congress intended

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Dodd, Chairman of the Subcommittee) (discussing the recent explosion of baseless securities lawsuits filed solely for their settlement value).

68. Conference Report, *supra* note 7.

69. *Id.*

70. Exchange Act, *supra* note 3.

71. Reform Act, *supra* note 1, at 747 (emphasis added).

only to codify the Second Circuit's case law.<sup>72</sup> It is generally accepted that "where Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms."<sup>73</sup> The language of the statute, requiring the pleading of facts which establish a "strong inference" of scienter, mirrors language often used by the Second Circuit and other courts following a similar standard.<sup>74</sup> However, an analysis of the statute's legislative history shows clearly that a codification of Second Circuit case law was not intended. In fact, Congress intended "a new, more stringent body of case law to develop, holding plaintiffs' allegations of fraud to an even more rigorous pleading standard."<sup>75</sup>

### *B. Legislative History of Section 21D(b)(2)*

As discussed in Part II of this Note, the Second Circuit's requirement that a plaintiff plead facts which give rise to a strong inference of scienter "is tempered by a mitigating rule that recognizes that a plaintiff can satisfy the requirement by 'alleg[ing] facts showing a motive for committing fraud and a clear opportunity for doing so.'"<sup>76</sup> If Congress intended to codify the Second Circuit's motive and opportunity standard, they could have done so by simply including the motive and opportunity language in the final version of 21D(b)(2).<sup>77</sup> Not only did Congress fail to include such language in the final version, but they *intentionally* refused to include such language. Senator Arlen Specter proposed an amendment to S. 240,<sup>78</sup> which would have stated that a strong inference of scienter could be established by "alleging facts to show the defendant had both motive and opportunity to commit fraud, or by alleging facts that constitute strong

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72. John C. Coffee, Jr., *The Future of the Private Securities Litigation Reform Act: Or, Why the Fat Lady Has Not Yet Sung*, Q253 ALI-ABA 81, 978 (1996).

73. NLRB v. Amax Coal Co., 453 U.S. 322, 329 (1981); *see also* Perrin v. United States, 444 U.S. 37, 42 (1979).

74. *See supra* notes 45-49 and accompanying text (articulating examples of the Second Circuit's strong inference test for pleading scienter).

75. James N. Benedict et al., *The Private Securities Litigation Reform Act of 1995: A Summary and Analysis*, SA90 ALI-ABA 493, 497 (1996).

76. Coffee, *supra* note 72, at 979 (quoting San Leandro Emergency Medical Group Profit Sharing Plan v. Philip Morris Cos., 75 F.3d 801, 813 (2d Cir. 1996)); *see also* Shields v. Citytrust Bancorp, Inc., 25 F.3d 1124, 1128 (2d Cir. 1994). As discussed in Part I of this Note, the First, Fifth and Seventh Circuits also appear to follow some form of the Second Circuit's motive and opportunity test. *See supra* notes 41-42 and accompanying text.

77. *See Silicon Graphics I*, 1996 WL 664639, at \*6 ("The Conference Committee's deletion of the Second Circuit standard from the final bill 'strongly militates against a judgment that Congress intended a result that it expressly declined to enact.'") (quoting *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974)).

78. Amend. 1485, S. 240, 104th Cong., 1st Sess. (1995); *see* 141 CONG. REC. S1075 (daily ed. Jan. 18, 1995).

circumstantial evidence of conscious misbehavior or recklessness by the defendant.”<sup>79</sup> This language is virtually identical to the language commonly used by the Second Circuit,<sup>80</sup> yet it was omitted from the final Conference Report. Alone, this omission might conceivably suggest that Congress felt that the “strong inference” language of the final version of 21D(b)(2) was clear enough to instruct courts to apply the Second Circuit’s standard. “At most, different circuits might have taken slightly different approaches to when a showing of motive and opportunity raised a strong inference of fraud.”<sup>81</sup>

But the omission does not stand alone. The Conference Report<sup>82</sup> discusses quite clearly Congress’ intended relation between section 21D(b)(2) and the Second Circuit’s motive and opportunity standard for pleading a strong inference of scienter:

Regarded as the most stringent pleading standard, the Second Circuit requirement is that the plaintiff must state facts with particularity, and that these facts, in turn, must give rise to a “strong inference” of the defendant’s fraudulent intent. Because the Conference Committee intends to strengthen existing pleading requirements, it does not intend to codify the Second Circuit’s case law interpreting this pleading standard.<sup>83</sup>

In a footnote to this statement, the Conference Report reads, “For this reason, the Conference Report chose not to include in the pleading standard certain language relating to motive, opportunity, or recklessness.”<sup>84</sup>

In addition to the language from the Conference Report, further evidence of Congressional intent to strengthen the pleading standard beyond that of the Second Circuit may be derived from President Clinton’s veto message of the Reform Act,<sup>85</sup> which clearly resolves any possible ambiguities in the legislative history. The President specifically objected to section 21D(b)(2), stating that “the pleading requirements of the Conference Report with regard to a defendant’s state of mind impose an unacceptable procedural hurdle to meritorious claims being heard in Federal Courts.”<sup>86</sup> He went on to state specifically why the pleading standard was unacceptable in his mind:

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79. 141 CONG. REC. S17,959-61 (daily ed. Dec. 5, 1995) (statement of Senator Specter). The full text of the Specter Amendment is available in 2 SWEEPING REFORM: LITIGATING AND BESPEAKING CAUTION UNDER THE NEW SECURITIES LAWS 795-98 (PLI Corp. Law & Practice Handbook Series No. B-924 1996). The Senate passed the Specter Amendment by a vote of 57 to 42 on June 28, 1995.

80. *See supra* note 45 and accompanying text.

81. Coffee, *supra* note 72, at 979.

82. Conference Report, *supra* note 7.

83. *Id.* at H15,215.

84. *Id.* at n.23.

85. Veto Message, *supra* note 4.

86. *Id.*

I am prepared to support the high pleading standard of the U.S. Court of Appeals for the Second Circuit - the highest pleading standard of any Federal circuit court. But the conferees make crystal clear in the Statement of Managers their intent to raise the standard even beyond that level. I am not prepared to accept that.<sup>87</sup>

The President continued by noting the intentional deletion of the provision concerning motive and opportunity which was offered by Senator Specter.<sup>88</sup> He further noted that Congress "specifically indicated that they were not adopting the Second Circuit case law but instead intended to 'strengthen' the existing pleading requirements of the Second Circuit. All this shows that the conferees meant to erect a higher barrier to bringing suit than any now existing . . ."<sup>89</sup>

In answering the President's Veto Message, Senators Bradley and Domenici argued that section 21D(b)(2) is based only "in part" on the Second Circuit's motive and opportunity standard.<sup>90</sup> They explained that even within the Second Circuit, interpretations of the motive and opportunity standard vary, and this is why the Conference Report expressly rejects a *de facto* codification of the Second Circuit standard.<sup>91</sup>

However, the argument of Senators Bradley and Domenici, that a partial codification of the Second Circuit standard was intended by Congress, does not conclusively establish that such a codification was intended. Especially due to the proximity of the argument to the President's Veto Message. And even if such a "partial codification" was intended, the motive and opportunity language proposed by Senator Specter could have easily been included in the final draft of the Conference Report and in the body of section 21D(b)(2). The continued omission of the precise language which would have appeased a large concern of the President concerning the Reform Act "strongly infers" that Congress intended exactly what the President objected to in his Veto Message: a strengthening of existing pleading standards, including that of the Second Circuit.

While this text from the Conference Report seems to make it quite clear that Congress intended not to codify the Second Circuit's case law regarding motive and opportunity, but to strengthen the requirement beyond that of the Second Circuit, some still claim that the legislative history is ambiguous.<sup>92</sup> Due to the ambiguity, they claim, the only reasonable interpretation is that Congress intended courts to look to the text of section 21D(b)(2), which further implies that a codification of existing case law using the terms "strong inference" was intended.<sup>93</sup>

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87. *Id.*

88. *Id.*; see also Statement of Senator Specter, *supra* note 79, and accompanying text.

89. *Id.*

90. H.R. CONF. REP. NO. 369, 104th Cong., 1st Sess. 41 (1995) ("In fact, the language of the bill does codify the Second Circuit standard in part -- and the statement of managers says so.").

91. *Id.*; see also Coffee, *supra* note 72, at 982.

92. See Dawes, *supra* note 24, at 64.

93. *Id.*

This interpretation assumes that the courts are incapable of formulating an intelligent and coherent standard without rigid adherence to an existing body of case law. However, the integrity and effectiveness of the judiciary in the past should instill confidence that our courts are more than capable of developing a standard which will effectively balance the protection of investors from open market fraud with the abuse of the securities litigation system which gave rise to the Reform Act and section 21D(b)(2).<sup>94</sup>

#### IV. *MARKSMAN PARTNERS AND APPLICATION OF MOTIVE AND OPPORTUNITY IN THE NINTH CIRCUIT*

The first case to address the issue of determining if a strong inference of scienter has been pled is *Marksman Partners, L.P. v. Chantal Pharmaceutical Corp.*<sup>95</sup> Chantal Pharmaceutical Corp. attempted to use section 21D(b)(2) to dismiss a securities fraud lawsuit alleging that Chantal Burnison, the Chief Executive of the company, withheld damaging information from investors.<sup>96</sup> However, the court refused to dismiss the suit, holding that the plaintiffs sufficiently pled facts satisfying the motive and opportunity test of the Second Circuit, and thus established a strong inference of scienter as required by section 21D(b)(2).<sup>97</sup> The court in *Marksman* sets out a well-structured opinion which effectively describes the Second Circuit's standard for establishing a strong inference of scienter. However, the court incorrectly dismisses clear portions of the legislative history and fails to correctly balance the competing factors which gave rise to 21D(b)(2).

##### *A. The Facts*

Because *Marksman* is a securities fraud case involving an alleged violation of Generally Accepted Accounting Principles (GAAP), the facts are relatively complicated. However, a complete understanding of the facts is necessary to understand the flawed reasoning of the court. Marksman Partners ("Marksman"), a Washington limited partnership, traded common stock of Chantal Pharmaceutical Corporation ("Chantal") between November, 1995, and January, 1996. Chantal Burnison ("Burnison") was the Chairman of the Board and Chief Executive Officer of Chantal Pharmaceutical Corp. during the period involved in the complaint.<sup>98</sup>

Marksman claimed in its complaint that Chantal and Burnison "developed a plan to restore value to Chantal's common stock by reporting high sales

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94. Part V describes a standard which effectively balances these concerns.

95. 927 F. Supp. 1297 (C.D. Cal. 1996).

96. See France, *supra* note 11, at 127 (discussing how the goals of the securities litigation system which the Reform Act was intended to accomplish are not materializing due to judicial interpretation of certain provisions, including the heightened pleading requirement of 21D(b)(2)).

97. *Marksman*, 927 F. Supp. at 1312-13 ("Marksman has sufficiently pled facts giving rise to a 'strong inference' of scienter under the 'motive and opportunity' test").

98. *Id.* at 1301.

revenues on what were essentially consignment sales<sup>99</sup> of [Chantal's principle product] to a distributor. . . . Thereafter, Marksman contend[ed], Chantal began to report dramatically increased revenues.”<sup>100</sup>

Marksman claims that on July 10, 1995, Chantal announced that it had signed a marketing agreement with Stanson Marketing (“Stanson”) of Los Angeles for the purchase by Stanson of Chantal’s principle product, Ethocyn. The terms of the agreement allegedly created a consignment sale.<sup>101</sup> “Stanson [had] the right to return the product within 60 days in the event it was unable to distribute the product successfully. Further, Stanson had a period of 90 days to pay for any product shipped.”<sup>102</sup>

Marksman further claimed that according to GAAP, Chantal was not authorized to report the sales revenues from the Stanson agreement due to the consignment nature of the sale. Despite the GAAP requirements, Chantal allegedly recognized revenue on the sales immediately when the product was shipped. This reporting violation allegedly overstated Chantal’s revenues by figures ranging from \$3,000,000 to \$10,000,000.<sup>103</sup>

While information regarding these increased revenues was being released to the public through Bloomberg News Services, during the period between July 1995 and October 1995, Chantal allegedly made a private placement of its stock.<sup>104</sup> Shortly after the private placement of 1,000,000 shares of restricted common stock and 500,000 shares of convertible preferred stock, Chantal’s stock price rose from \$4.90 per share to \$12.25 per share.<sup>105</sup> The Los Angeles Business Journal reported that Chantal’s stock price increase was the result of the “company’s stellar sales figures announced in June and an agreement signed the same month between Chantal and Stanson.”<sup>106</sup>

Marksman first purchased shares of Chantal common stock on November 17, 1995. At some point in December, Marksman contends that Burnison sold 300,000 shares of her own personally-held stock for over \$20 per share. The net proceeds of Burnison’s sale was over \$6.3 million.

On January 6, 1996, Barron’s financial journal published an article “questioning Chantal’s accounting and whether Chantal’s reported revenues represented a true sale, since the risk of ownership of the products did not appear

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99. A consignment sale “is one in which goods are delivered by a consignor to a dealer or distributor (the consignee) primarily for sale by the consignee, and the consignee has the right to return any unsold commercial units of the goods in lieu of payment. . . . Because a product return cancels the sale, any sale made with the right of return creates doubt about whether the transaction actually constitutes an exchange.” *Id.* (citations omitted).

100. *Id.*

101. *See supra* note 99.

102. *Marksman*, 927 F. Supp. at 1301-02.

103. *Id.* at 1302. Marksman also alleged that Chantal violated GAAP reporting requirements by not disclosing that the agreement with Stanson was a “related party transaction.” *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

to have transferred from Chantal to Stanson.”<sup>107</sup> Two days later, Chantal’s stock price dropped 62%.<sup>108</sup>

Marksman held 29,000 shares at the time. On January 8, 1996, following the publication of the Barron’s article, Marksman sold all of its shares at an average price of \$7.53 per share, for a net loss of over \$300,000. On February 7, 1996, Marksman filed a class action complaint against Chantal Pharmaceutical Corp. and Burnison,<sup>109</sup> alleging that the defendants fraudulently reported the consignment sales in violation of GAAP reporting requirements in order to artificially inflate the price of Chantal’s stock. Chantal and Burnison filed a motion to dismiss, relying on section 21D(b)(2) of the Reform Act, claiming that Marksman failed to sufficiently plead scienter.<sup>110</sup>

### *B. Ninth Circuit Standard Before the Reform Act*

Prior to the enactment of the Reform Act, the Ninth Circuit took a relatively lenient approach to determining the sufficiency of a scienter pleading.<sup>111</sup> These courts read the language of Rule 9(b)<sup>112</sup> strictly and found that the condition of mind of the defendant could be “averred generally.”<sup>113</sup>

For example, the Ninth Circuit court in *In re GlenFed, Inc. Securities Litigation*<sup>114</sup> held that “[w]herever it is material to allege malice, fraudulent intention, knowledge, or other conditions of the mind of any person, it shall be sufficient to allege the same as a fact without setting out the circumstances from which the same is to be inferred.”<sup>115</sup> The court felt that anything more would contradict the plain language of Rule 9(b), and that such a change in the standard is a job for Congress and not the courts.<sup>116</sup> Other courts in the Ninth Circuit took similar approaches, generally holding that scienter may be plead through conclusory allegations.<sup>117</sup>

However, the court in *Marksman* conceded that the Reform Act raised the standard of pleading scienter beyond that previously embraced by the Ninth Circuit. “The [Reform Act] leaves little doubt . . . that the lenient *GlenFed*

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107. *Id.* at 1303.

108. On January 8, 1996, the stock price dropped from \$19.125 to \$7.31 per share on a trading volume of over 7,000,000 shares.

109. *Marksman*, 927 F. Supp. at 1303.

110. *Id.* at 1304.

111. See John F. Olson et al., *Pleading Reform, Plaintiff Qualification and Discovery Stays Under the Reform Act*, 51 BUS. L.W. 1101, 1109-10 (1996).

112. See *supra* notes 26-29 and accompanying text (discussing Rule 9(b) and strict construction of the Rule’s requirement for pleading the defendant’s state of mind).

113. FED. R. CIV. P. 9(b).

114. 42 F.3d 1541 (9th Cir. 1994).

115. *Id.* at 1545.

116. *Id.* at 1546.

117. See *Greenwald v. Wells Fargo & Co.*, 12 F.3d 922 (9th Cir. 1993); *Wool v. Tandem Computers*, 818 F.2d 1433 (9th Cir. 1987); *Fecht v. Price Co.*, 70 F.3d 1078 (9th Cir. 1995).

standard can no longer be said to constitute the sum of scienter pleading requirements in a Section 10(b) and Rule 10b-5 case.”<sup>118</sup> Where the *Marksman* court erred, however, was in raising the pleading standard only to the existing standard practiced by the Second Circuit.

### *C. Pleading Standard for Scienter Under Section 21D(b)(2)*

The *Marksman* court held that a plaintiff in a securities fraud action may plead scienter by alleging motive and opportunity on the part of the defendant to commit fraud.<sup>119</sup> “[T]he motive and opportunity test appears to be consistent with Congress’s intent that scienter be pled with more than conclusory or generic allegations.”<sup>120</sup> The court was unpersuaded by the defendants’ contention that the Reform Act rejected the Second Circuit’s motive and opportunity standard.<sup>121</sup> The defendants relied on the legislative history of the Reform Act and of section 21D(b)(2). They pointed to the Conference Report, which emphasized that 21D(b)(2) was intended to strengthen existing pleading requirements and therefore did not intend to codify the Second Circuit’s standard.<sup>122</sup> Despite the seemingly clear legislative history, however, the court found that the motive and opportunity test had not been abandoned.<sup>123</sup>

First, the court noted that the conference committee, in drafting 21D(b)(2), emphasized that the Second Circuit’s standard is more stringent than the standard of any other circuit. The court thus assumed that case law from the Second Circuit must be the closest approximation of the Reform Act’s new requirements.<sup>124</sup> Not only is this a weak assumption, but its logic is faulty. If Congress intended to strengthen *existing* pleading standards, and the Second Circuit’s standard is the strongest existing standard, it does not logically follow that Congress intended courts to follow that standard. It may well be that the Second Circuit’s standard comes closest to approximating the standard intended by Congress, but only because it is in fact the strongest standard existing. However, simply because the standard comes closest to that intended by Congress does not mean that it *is* the standard intended by Congress. It seems that the court in *Marksman* attempted to avoid the more difficult analysis which would have followed from applying a truly heightened pleading standard that Congress intended, so it took the easy way out and essentially codified the standard of the Second Circuit.

The *Marksman* court’s second argument for codification of the motive and opportunity test of the Second Circuit was that the precise language of section

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118. *Marksman*, 927 F. Supp. at 1309.

119. *Id.* at 1310-11.

120. *Id.* (citing *Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1128 (2d Cir. 1994)).

121. *Id.*

122. *Id.* at 1310 (citing H.R. CONF. REP. NO. 369, 104th Cong., 1st Sess. 41 (1995)).

123. *Id.* (“Notwithstanding defendants’ citation to the legislative history, a number of considerations militate against their argument.”).

124. *Id.*

21D(b)(2), that a plaintiff must establish a strong inference of scienter, “mirrors language traditionally employed by the Second Circuit in its application of Rule 9(b) to scienter pleadings.”<sup>125</sup> The court, however, leaves this argument as essentially conclusory, and fails to recognize that more than one method of establishing a “strong inference” can consistently co-exist. The motive and opportunity test is not the only conceivable method of establishing a strong inference of scienter. Simply because Congress used some of the same general language that the Second Circuit used to describe its pleading standard, it does not follow that Congress intended courts to adopt the Second Circuit’s entire approach for establishing the strong inference.

The court continued to rationalize its decision by stating the restrictions on the motive and opportunity test which have been developed by the Second Circuit to safeguard concerns that the “generic motive”<sup>126</sup> of increasing capital or revenue based compensation will not be sufficient to establish a strong inference.<sup>127</sup> However, as argued in Part II of this Note, these safeguards can be overcome through creative lawyering.<sup>128</sup>

Finally, the court explains that “when Congress wishes to supplant a judicially-created rule it knows how to do so explicitly, and in the body of the statute.”<sup>129</sup> This argument refers to the fact that the Conference Committee’s intentional omission of language pertaining to motive and opportunity appears in a footnote to the Conference Report rather than in its text or in the body of the Reform Act.<sup>130</sup> However, this argument assumes that when Congress wishes to change a judicially-created rule, it will always follow the same method, regardless of the existence of equally clear methods such as inclusion of the change in a footnote to text which clearly indicates their intention.

The court concludes that the Second Circuit’s motive and opportunity test is therefore consistent with Congressional intent. “Because Second Circuit jurisprudence in the area of securities fraud claims is wholly consistent with both the language and purpose of the [Reform Act], the court finds the ‘motive and opportunity’ test to be a suitable standard to employ in this case.”<sup>131</sup> The court

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125. *Id.* (citing *Shields*, 25 F.3d at 1128; *Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1176 (2d Cir. 1993).

126. *Id.*

127. See *supra* notes 53-61 and accompanying text. The *Marksman* court cites *Grossman v. Texas Commerce Bancshares, Inc.*, No. 87CIV.6295, 1995 WL 552744 (S.D.N.Y. Sept. 15, 1995), which states that “[a]llegations of motive that are generally held by similarly positioned executives and companies [e.g., to improve the company’s financial health or reputation] are insufficient to sustain a claim under the securities laws.” *Id.*; see also *In re Crystal Brands Sec. Litig.*, 862 F. Supp. at 749.

128. See *supra* note 65 and accompanying text.

129. *Marksman*, 927 F. Supp. at 1311 (citations omitted).

130. See Conference Report, *supra* note 7, at H15,215.

131. *Marksman*, 927 F. Supp. at 1312. Subsequent to the *Marksman* decision, a line of cases has held similarly that the motive and opportunity standard is consistent with Congress’ intent in drafting section 21D(b)(2). See, e.g., *In re Health Mgmt. Inc. Sec. Litig.*, 970 F. Supp. 192, 201

then proceeded to apply the test to the facts of the case at hand.

#### *D. Motive and Opportunity Applied to the Facts in Marksman*

The court in *Marksman* first quickly establishes that Chantal and Burnison had the opportunity to commit fraud. This analysis seems to be sound. The court states that “[t]here is no question about Chantal and Burnison’s ‘opportunity’ to carry out the means, i.e., misrepresentations about Chantal’s financial performance to the public, necessary to accomplish these benefits.”<sup>132</sup> The court explained that both Chantal and Burnison had significant control over the accounting procedures and financial statements for the corporation during the relevant time period. They also had direct access to pertinent information concerning the financial conditions and operations of the corporation.<sup>133</sup>

The court’s finding of motive was a bit more involved than the opportunity analysis. Marksman based its claim on four alleged motives: (1) to enhance the value of Chantal stock; (2) to successfully complete the private placement of stock; (3) to enhance Burnison’s compensation and prestige; and (4) to sell a large portion of Burnison’s stock at prices which had been artificially inflated by the misleading information.<sup>134</sup>

The court correctly found that the first three motives were insufficient to raise a strong inference of scienter. These alleged motives are too general in nature and are shared by virtually every company in the United States.<sup>135</sup> Therefore, the court concluded, “Marksman’s allegations that misrepresentations were made to increase Chantal’s stock value, which would facilitate sales of the corporation’s stock and increase executive compensation cannot, without more, establish scienter.”<sup>136</sup>

The court found that the last motive, to allow Burnison to sell stock at artificially inflated prices, was sufficient to establish a strong inference of scienter.<sup>137</sup>

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(E.D.N.Y 1997) (holding that “motive and opportunity . . . is sufficient to plead a strong inference of scienter under the [Reform Act]”); *Rehm v. Eagle Finance Corp.*, 954 F. Supp. 1246, 1253 (N.D. Ill. 1997) (concluding that “a scienter pleading standard equivalent to the Second Circuit rule best comports with the language, history, and purpose of the [Reform Act]”); *In re Wellcare Mgmt. Group, Inc. Sec. Litig.*, 964 F. Supp. 632 (N.D.N.Y. 1997). These cases base their holdings on essentially the same reasoning described in this section as utilized by the court in *Marksman*.

132. *Marksman*, 927 F. Supp. at 1312 (citing *Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1130 (2d Cir. 1994) (defining opportunity as the “means and likely prospect of achieving concrete benefits by the means alleged”)).

133. *Id.* (citing *Cohen v. Koenig*, 25 F.3d 1168, 1173-74 (2d Cir. 1994) (finding opportunity to commit fraud to be present where the defendants were officers, directors and majority shareholders fully familiar with the company’s operations and accounting procedures)).

134. *Id.*

135. *Id.* (citing *Acito*, 47 F.3d at 54).

136. *Id.*

137. *Id.* (“The last ‘motive’ allegation made by Marksman, however, is sufficient to constitute

Allegations that a corporate insider either presented materially false information, or delayed disclosing materially adverse information, in order to sell personally-held stock at a huge profit can supply the requisite “motive” for a scienter allegation. . . . Thus, insider trading activity during the class period may support a strong inference of scienter. . . . A plaintiff, however, must demonstrate that the insider trading activity was “unusual,” . . . , which requires a showing that the trading was in “amounts dramatically out of line with prior trading practices, at times calculated to maximize personal benefit from undisclosed inside information.”<sup>138</sup>

The court found that this motive analysis was met by *Marksman*’s pleadings that Burnison sold 300,000 of her shares of Chantal stock at an artificially inflated price of over \$20 per share while information concerning revenues from consignment sales which violated GAAP reporting procedures was being released to the public.

#### *E. Incorrect Means to a Probable End*

Any 21D(b)(2) case is bound to be highly fact sensitive. Therefore, it is important for courts to state a completely accurate analysis in reaching their conclusions. The *Marksman* case is a perfect example of how such an analysis can be misstated with the illusion that the correct result is being reached. The court in *Marksman* was blessed with a set of facts so clear that the highest conceivable standard for pleading scienter could have been met. Yet the Court chose the simple route of codifying the Second Circuit standard, rather than grappling with the true legislative intent and balancing the risk factors intended to be incorporated into the new pleading standard of 21D(b)(2).

The standard proposed by this Note and which has in fact been followed by courts since the passage of the Reform Act is that a plaintiff must “allege specific facts that constitute circumstantial evidence of conscious behavior by defendants.”<sup>139</sup> The facts in *Marksman* could have met this heightened standard, while setting precedent that could be followed by courts in other circuits which would be consistent with Congress’ intent in drafting the Reform Act. The *Marksman* court discussed this standard as an alternative ground for finding the pleadings of *Marksman* sufficient to establish a strong inference of scienter.<sup>140</sup> Therefore, it is difficult to understand why the court insisted on codifying the more lenient “motive and opportunity” test.

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a sound basis for the scienter element of a Section 10(b) and Rule 10b-5 claim”).

138. *Id.* (quoting *Alfus v. Pyramid Tech. Corp.*, 764 F. Supp. 598, 605 & n.1 (N.D. Cal. 1991) (citations omitted)).

139. *In re Silicon Graphics I*, 1996 WL 664639, at \*6.

140. *Marksman*, 927 F. Supp at 1313 (“Even assuming, arguendo, that the ‘motive and opportunity’ test does not yield the requisite ‘strong inference,’ *Marksman* may still successfully plead a strong inference of scienter under the Second Circuit’s ‘circumstantial evidence’ test.”).

## V. *SILICON GRAPHICS* AND THE “CIRCUMSTANTIAL EVIDENCE” TEST

In *Silicon Graphics I*,<sup>141</sup> the court rejected the analysis of the *Marksman* court, which determined that the scienter pleading requirements could be sustained by demonstrating motive and opportunity.<sup>142</sup> “The *Silicon Graphics I* court found an intent to exceed that standard not only in the legislative history, but also in the fact that Congress overrode the presidential veto that expressly noted support for the Second Circuit standard and expressed concern that ‘Congress ma[d]e [it] crystal clear in the [conference report] [its] intent to raise the standard even beyond that level.’”<sup>143</sup>

### A. Facts of *Silicon Graphics I*

Silicon Graphics, Inc. (“SGI”) is a Delaware corporation with stock traded on the New York Stock Exchange. On January 29, 1996, plaintiffs filed a class action complaint against SGI alleging violations of section 10(b) of the Securities Exchange Act of 1934.<sup>144</sup> Specifically, plaintiffs alleged that SGI “made material misrepresentations about [their] growth prospects and general financial condition, and failed to disclose adverse facts about [the company’s] products, management, and competitors.”<sup>145</sup>

In August 1995, SGI stock declined to the high \$20s, from an all-time high of \$44 7/8.<sup>146</sup> The decline in price was the result of “market concern that SGI would be unable to maintain its historic forty percent growth rates given increased competition.”<sup>147</sup> In October 1995, SGI announced a thirty-three percent growth in revenue for the first quarter of the fiscal year. This growth rate was viewed by market analysts as disappointing because of high growth targets announced by SGI earlier in the year.<sup>148</sup> Subsequently, SGI asserted in a press release that the second quarter results would be closer to the company’s growth targets.<sup>149</sup>

The stock price fell again in December 1995, when rumors surfaced that the second quarter results might also be below anticipated growth rates.<sup>150</sup> In early January 1996, SGI confirmed the rumors, causing the stock price to fall to \$22

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141. No. 96-0393, 1996 WL 664639 (N.D. Cal. Sept. 25, 1996).

142. *Id.* at \*6 & n.4.

143. Harvey L. Pitt & Karl A. Goskaufmanis, *Nine Months After the Enactment of Securities Litigation Reform, Courts Are Clarifying the New Limitations Set By the Act*, NAT’L L.J., Oct. 28, 1996, at B5 (quoting H.R. DOC. NO. 104-150, 104th Cong., 1st Sess. 240 (1995)).

144. *Silicon Graphics I*, 1996 WL 664639, at \*1. Plaintiffs also filed a derivative action, alleging breach of fiduciary duty and gross negligence by SGI. *Id.*

145. *Id.* at \*2.

146. *Id.* at \*1.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

per share.<sup>151</sup> The plaintiff's class action complaint was filed on January 29, 1996, alleging that "SGI . . . violated federal securities law by issuing false and misleading information about the company after the disappointing first quarter, in an effort to inflate the price of SGI stock for the purpose of selling their own stock at a substantial profit."<sup>152</sup>

*B. Argument for the "Circumstantial Evidence" Test Over the "Motive and Opportunity" Test*

After discussing the applicability of section 10(b) of the Exchange Act, and Rule 10b-5 thereunder,<sup>153</sup> the court in *Silicon Graphics I* proceeded to define the standard for pleading scienter under the Reform Act. The court relied heavily on the legislative history of the Reform Act, and section 21D(b)(2) in particular, in holding that Congress intended to enact a pleading requirement more stringent than the motive and opportunity standard of the Second Circuit.<sup>154</sup>

The court noted that the Conference Report explicitly states that it "intends to strengthen existing pleading requirements, [and] it does not intend to codify the Second Circuit's case law interpreting the pleading standard."<sup>155</sup> Further, the court recognized that the Senate Bill "included an amendment that would have codified the Second Circuit's standard, and would have allowed a plaintiff to use allegations of recklessness or motive and opportunity to establish fraudulent intent."<sup>156</sup> The intentional omission of this amendment, the court reasoned, shows an intent to create a new standard.<sup>157</sup>

The court also considered significant the President's veto message to Congress, in which he expressed concern that Congress had "ma[d]e crystal clear in the Statement of Managers their intent to raise the standard even beyond [that of the Second Circuit]."<sup>158</sup> By overriding the veto, the court reasoned, Congress made clear its intent to "heighten the pleading standard."<sup>159</sup>

Finally, the court in *Silicon Graphics I* rejected the plaintiff's legislative

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151. *Id.*

152. *Id.* Plaintiff also named nine SGI officers and directors as defendants. *Id.* at n.2.

153. See Rule 10b-5, *supra* note 2.

154. *Silicon Graphics I*, 1996 WL 664639 at \*5-\*6.

155. *Id.* at \*5 (quoting Conference Report, *supra* note 7). "For this reason, the Conference Report chose not to include in the pleading standard certain language relating to motive, opportunity, or recklessness." *Id.* at n.23.

156. *Id.* (citing Amend. 1485, S. 240, 104th Cong., 1st Sess. (1995)).

157. *Id.* "The Conference Committee's deletion of the Second Circuit standard from the final bill 'strongly militates against a judgment that Congress intended a result that it expressly declined to enact.'" *Id.* at \*6 (quoting *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974)); *People for Environmental Progress v. Leisz*, 373 F. Supp. 589, 592 (C.D. Cal. 1974) (stating that the conference committee's "deletion of proposed amendment from bill is 'significant' and 'persuasive' evidence of Congressional intent").

158. *Id.* (quoting Veto Message, *supra* note 4).

159. *Id.*

history arguments involving statements by certain Senators that the language of section 21D(b)(2) codifies the Second Circuit standard “in part.”<sup>160</sup> The court reasoned that

these are the statements of only a few individual members of a Congress that ultimately adopted the Conference Report and passed the bill as formulated by the Conference Committee. As the Supreme Court has noted, “the authoritative source for finding the Legislature’s intent lies in the Committee Reports on the bill, which ‘represen[t] the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation.’”<sup>161</sup>

The court continued, “Committee reports, not ‘[s]tray comments by individual legislators,’ provide the best expression of legislative intent.”<sup>162</sup>

Based on the above excerpts from the legislative history, the court concluded that Congress intended to raise the standard for pleading scienter in a securities fraud claim beyond that existing in the Second Circuit prior to the Reform Act.<sup>163</sup> “The Court therefore [held] that plaintiff must allege specific facts that constitute circumstantial evidence of conscious behavior by defendants.”<sup>164</sup>

### C. The “Circumstantial Evidence” Test

“In establishing circumstantial evidence of conscious behavior or actual knowledge, as required by the [Reform Act], [a] plaintiff must do more than speculate as to defendants’ motives or make conclusory allegations of scienter; [a] plaintiff must allege specific facts.”<sup>165</sup> While the court in *Silicon Graphics I* held that this “circumstantial evidence” test was the method by which Congress intended plaintiffs to plead scienter in any securities fraud lawsuit, other courts, primarily in the Second Circuit, have described the test as a possible alternative to the motive and opportunity test.<sup>166</sup> In fact, even the court in *Marksman*, which

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160. See *supra* notes 90-91 and accompanying text (discussing the statements of Senators Bradley and Domenici in response to the President’s veto message).

161. *Silicon Graphics I*, 1996 WL 664639, at \*6 (citing *Garcia v. United States*, 469 U.S. 70, 76 (1984) (quoting *Zuber v. Allen*, 396 U.S. 168, 186 (1969)); *RTC v. Gallagher*, 10 F.3d 416, 421 (7th Cir. 1993) (stating that the Conference Report “is the most persuasive evidence of congressional intent besides the statute itself”)).

162. *Id.* (quoting *In re Kelly*, 841 F.2d 908, 912 n.3 (9th Cir. 1988)).

163. *Id.*

164. *Id.*

165. *Id.* at \*12 (citing *Wexner v. First Manhattan Co.*, 902 F.2d 169, 172-73 (2d Cir. 1990); *Denny v. Barber*, 576 F.2d 465, 470 (2d Cir. 1978)).

166. See, e.g., *Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1128-30 (2d Cir. 1994) (“The requisite ‘strong inference’ of fraud may be established either (a) by alleging facts to show that defendants had both motive and opportunity to commit fraud, or (b) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness.”); *Beck v. Manufacturers Hanover Trust Co.*, 820 F.2d 46, 50 (2d Cir. 1987) (“it is . . . possible to plead scienter by

held that section 21D(b)(2) was essentially a codification of the motive and opportunity test, endorsed the circumstantial evidence test for situations in which “the ‘motive and opportunity’ test [would] not yield the requisite ‘strong inference’ . . . .”<sup>167</sup>

Courts applying the above test have imposed the additional requirement that “[i]f the ‘circumstantial evidence’ method is used, the strength of the circumstantial allegations must be correspondingly greater.”<sup>168</sup> While courts in the Second Circuit have generally applied the motive and opportunity test in evaluating the sufficiency of a pleading, they have also discussed the requisite strength of the pleadings with respect to the circumstantial evidence test.

For example, in *Marksman*, the court stated that the circumstantial evidence test could be met by showing a violation of Generally Accepted Accounting Principles (GAAP) on the part of the defendants.<sup>169</sup> “A violation of [GAAP] may be used to show that a company overstated its income, which may be used to show the scienter for a violation of Section 10(b) and Rule 10b-5.”<sup>170</sup> The court proceeded to explain that the GAAP violation will not alone be sufficient to establish fraud, but “when combined with other circumstances suggesting fraudulent intent, . . . allegations of improper accounting may support a strong inference of scienter.”<sup>171</sup> The court failed, however, to describe what “other circumstances” would be required to raise the pleading to a sufficient level in establishing a strong inference under the circumstantial evidence test.

In *Shields v. Citytrust Bancorp, Inc.*,<sup>172</sup> the court essentially used the circumstantial evidence test to reject the “fraud by hindsight” theory, by which a plaintiff could plead scienter by showing optimistic statements made by a defendant which ultimately failed to materialize.<sup>173</sup> The court held that “misguided optimism is not a cause of action, and does not support an inference of fraud. [The court thus] rejected the legitimacy of ‘alleging fraud by hindsight.’”<sup>174</sup>

While the courts which have addressed the circumstantial evidence test prior to the passage of the Reform Act have not explicitly stated precisely what type of facts are required to establish a strong inference of scienter, they have made clear that the circumstantial evidence must be stronger than mere allegations of motive and opportunity. The court in *Silicon Graphics I* followed this rule in dismissing the plaintiffs’ case for failure to adequately plead scienter on the part

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identifying circumstances indicating conscious behavior by the defendant”). See also *In re Time Warner*, 9 F.3d at 269.

167. *Marksman*, 927 F. Supp. at 1313 (citing *Glickman*, 1996 WL 88570 at \*14).

168. *Id.* (citing *Glickman*, 1996 WL 88570, at \*14); see also *Beck*, 820 F.2d at 50.

169. *Marksman*, 927 F. Supp. at 1313.

170. *Id.* (citing *Wechsler v. Steinberg*, 733 F.2d 1054, 1058-59 (2d Cir. 1984)).

171. *Id.*

172. 25 F.3d 1124 (2d Cir. 1994).

173. See *VANYO & YODOWITZ, supra* note 48, at 138-39 (discussing the effect of *Shields* on the fraud by hindsight theory).

174. *Shields*, 25 F.3d at 1129 (quoting *Denny v. Barber*, 576 F.2d 465, 470 (2d Cir. 1978)).

of the defendants.

#### *D. Application of the Test to the Facts of Silicon Graphics*

The court in *Silicon Graphics I* held that “[a]lthough [the] plaintiff does not . . . simply hold predictions up against the backdrop of what actually happened, her allegations nonetheless fall short of pleading a strong inference of fraud.”<sup>175</sup> The plaintiffs attempted to plead scienter by alleging that the defendants were aware of negative internal reports which contradicted SGI’s false and misleading statements and stock sales.<sup>176</sup> Specifically, the plaintiffs claimed that

[E]ach of the Individual Defendants was aware of Silicon Graphics’ fiscal 1996 forecast and budget and of internal reports, comparing Silicon Graphics’ actual results to those budgeted and/or forecasted. Based on the negative internal reports of the Company’s actual performance compared to that budgeted and forecasted, the Individual Defendants each knew Silicon Graphics was plagued by an inability to sell . . . as planned.<sup>177</sup>

The court found these allegations too general and common to any company employing an internal reporting system. “Every sophisticated corporation uses some kind of internal reporting system reflecting earlier forecasts; allowing [a] plaintiff to go forward with a case based on general allegations of ‘negative internal reports’ would expose all those companies to securities litigation whenever their stock prices dropped.”<sup>178</sup>

The court noted that the Second Circuit has held that “unsupported general claims of the existence of internal reports are insufficient to survive a motion to dismiss. Second Circuit courts require plaintiffs to specifically identify alleged internal reports, providing names and dates.”<sup>179</sup> The court reasoned, therefore, that because the Reform Act raised the pleading standard beyond that of the Second Circuit, “the Court cannot require anything less of [the] plaintiff in this case.”<sup>180</sup> The complaint was dismissed for failure to adequately plead scienter under the circumstantial evidence test.<sup>181</sup>

#### *E. Silicon Graphics II and the Road to a Uniform and Heightened Standard*

Following dismissal, the plaintiffs amended their complaint to include allegations that they felt met the “heightened” standard espoused by the court in

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175. *Silicon Graphics I*, 1996 WL 664639, at \*12.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* (citing *San Leandro Emergency Med. Plan v. Philip Morris Cos.*, 75 F.3d 801, 812-13 (2d Cir. 1996)).

180. *Id.*

181. *Id.* at \*13.

*Silicon Graphics I.*<sup>182</sup> The amended complaint contained allegations that the defendants were aware of negative internal reports, and that this awareness, coupled with substantial stock sales, gives rise to a strong inference of fraudulent intent.<sup>183</sup> The court rejected this argument, holding that “plaintiffs must provide more details about the alleged negative internal reports. The allegations should include the titles of the reports, when they were prepared, who prepared them, to whom they were directed, their content, and the sources from which plaintiffs obtained this information.”<sup>184</sup>

In finding the plaintiffs’ allegations inadequate, the *Silicon Graphics II* court relied on essentially the same arguments that formed the basis of the court’s decision in *Silicon Graphics I*, as described above. The court went on, however, to discuss the role of recklessness in the “strong inference” debate, an undertaking the court failed to pursue in *Silicon Graphics I*. The court held that to adequately plead fraud, a plaintiff “must create a strong inference of knowing or intentional misconduct.”<sup>185</sup> The court continued, stating that “[k]nowing or intentional misconduct includes deliberate recklessness, . . . [but] [m]otive, opportunity, and non-deliberate recklessness . . . are not alone sufficient to support scienter.”<sup>186</sup> Thus, the court in *Silicon Graphics II* restated the well-reasoned argument for raising the pleading standard beyond that of motive and opportunity, and it clarified the previously unsettled role of recklessness in the strong inference analysis. With this framework, as established by the two *Silicon Graphics* opinions, courts in the future have the tools for refining a truly heightened and uniform pleading standard.<sup>187</sup>

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182. *Silicon Graphics II*, 970 F. Supp. 746, 749 (N.D. Cal. 1997).

183. *Id.* at 766.

184. *Id.* at 767.

185. *Id.* at 757.

186. *Id.*

187. A line of cases has emerged following the *Silicon Graphics I* decision which has also argued that Congress intended to create a standard more stringent than the motive and opportunity standard. *See, e.g.*, *In re Baesa Sec. Litig.*, 969 F. Supp. 238, 242 (S.D.N.Y. 1997) (holding that allegations of motive and opportunity would no longer be sufficient in themselves to establish scienter); *In re Glenayre Technologies, Inc. Sec. Litig.*, 982 F. Supp. 294, 297 (S.D.N.Y. 1997) (holding that “under the [Reform Act] a showing of motive and opportunity, without more, no longer suffices to raise a strong inference of scienter”). The court in *Glenayre* emphasized that facts relating to motive and opportunity are still relevant to the scienter analysis, despite that they are not dispositive. The court explained that “[s]uch facts must be considered—along with other facts pled—in assessing whether a complaint raises a strong inference of knowing misrepresentation.” *Id.* at 298; *see also* *Norwood Venture Corp. v. Converse Inc.*, 959 F. Supp. 205, 208 (S.D.N.Y. 1997) (citing *Friedberg v. Discreet Logic Inc.*, 1997 WL 109228 (D. Mass. March 7, 1997), for the proposition that the Reform Act was intended to create a pleading standard “stronger than the existing Second Circuit standard”).

## CONCLUSION

By enacting the Private Securities Litigation Reform Act of 1995, Congress hoped to (1) reduce the occurrence of abusive or frivolous securities litigation which has plagued our nation's capital markets and undermined their integrity, and (2) create a degree of uniformity in the litigation practices among the circuits. A primary vehicle for this intended reform is the heightened standard for pleading the defendant's state of mind in a securities fraud lawsuit which must be met by a plaintiff in order to withstand a motion to dismiss.

Since the passage of the Reform Act, however, the goals of Congress have not been realized due to conflicting judicial interpretations within the Ninth Circuit. The court in *Marksman* interpreted the pleading standard of the Reform Act as essentially a codification of the Second Circuit's motive and opportunity standard. This interpretation is inconsistent with the legislative history of the pleading requirement and fails to remedy the abuses in the securities litigation system which initially gave rise to the Reform Act.

The court both in *Silicon Graphics I* and later in *Silicon Graphics II*, however, correctly interpreted the pleading requirement, holding plaintiffs to a higher standard than the motive and opportunity test of the Second Circuit. In *Silicon Graphics I*, the court held that in order to sufficiently plead scienter, plaintiffs "must allege specific facts that constitute circumstantial evidence of conscious behavior by defendants."<sup>188</sup> This standard is sensitive to the goals of Congress in initiating reform and strikes an appropriate balance between the need to prevent and redress deceptive and manipulative practices in securities litigation, and the maintenance of respectable capital markets. Therefore, courts in the future should follow the lead of the *Silicon Graphics* decisions by requiring plaintiffs to plead circumstantial evidence of conscious behavior in order to justify subjecting defendants to the abuses inherent in securities litigation.

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188. *Silicon Graphics I*, 1996 WL 664639, at \*5.



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